SUPREME COURT, U. S.
NOV 6 1974

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-549

ALLIED PILOTS ASSOCIATION,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent,

and

AMERICAN AIRLINES, INC., *et al.*,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this action on August 8, 1974.

Opinions Below

The opinion of the Court of Appeals for the District of Columbia Circuit which is reprinted in Appendix A has not been officially reported. Order 70-7-114 of the Civil

Aeronautics Board approving the Mutual Aid Pact which is reprinted in Appendix B is not reported. Order 70-11-110 of the Civil Aeronautics Board vacating Order 70-7-114 and remanding for further evidentiary proceedings which is reprinted in Appendix C is not reported. Order 73-2-110 of the Civil Aeronautics Board approving the Mutual Aid Pact, which is reprinted in Appendix D, is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on August 8, 1974. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. 1254 (1).

Questions Presented

(1) Has the Civil Aeronautics Board usurped Congressional authority and exceeded its own jurisdiction by approving a Mutual Aid Pact for the purpose of altering the balance of economic power between management and labor in the airline industry?

(2) Has the Civil Aeronautics Board acted arbitrarily and in violation of the Railway Labor Act, 45 U.S.C. §151 *et seq.* by extending the operation of an industry Mutual Aid Pact to union-management relations that admittedly function on a single carrier basis?

Statutes Involved

The pertinent provisions of the Railway Labor Act, as amended (45 U.S.C. §151, *et seq.*) and the Federal Aviation Act of 1958, as amended (49 U.S.C. §1301, *et seq.*) are set out in Appendix E.

Statement of the Case

The original Mutual Aid Pact was entered into in 1958 by six air carriers: American Airlines, Inc.; Capital Airlines, Inc.; Eastern Airlines, Inc.; Pan American World Airways, Inc; Trans World Airlines, Inc.; and United Air Lines, Inc. The Pact, limited in scope, duration and benefits, provided, in essence, that in the event of certain strikes, a carrier member meeting other criteria would receive "windfall" payments from the other members measured by their increased revenue because of the strike, less added expenses. Specifically, the operation of this Pact was limited to strikes seeking settlements in excess of or opposed to Presidential Emergency Board recommendations, called before exhaustion of Railway Labor Act procedures, or "otherwise unlawful". The Pact now before the Court has no such "public interest" limitations and provides payments to its members irrespective of the "justice" or fairness of their position. The first Pact was approved by the Civil Aeronautics Board ("the CAB") after oral argument, member Minetti dissenting. *Six Carrier Mutual Aid Pact*, 29 C.A.B. 168 (1959), reconsideration denied, 30 C.A.B. 90 (1959).

In October 1959, the Pact members requested continuation of the Mutual Aid Pact from the C.A.B. Before the CAB could act, substantial amendments were made to the Pact broadening its coverage and increasing its membership. In June 1960, the CAB directed an evidentiary hearing before further approval of the Pact. Order E-15413 (1960).

Hearings were begun in 1962, but in the midst of the hearings, the Pact members filed additional amendments to the Pact. Basically, these amendments provided for additional "supplemental payments" to a struck carrier. They guaranteed a carrier member would receive 25% of its normal air transport operating expenses for flight operations shut down because of a strike. The additional payments over "windfall" necessary to meet this guarantee would be contributed by each member in proportion to its air transport operating revenue for the prior year to the total revenue for all members. A maximum annual liability for each member of one-half of one percent of the prior year's air transport operating revenue was also provided.

After an Initial Decision by Examiner S. Thomas Simon, the CAB approved the amended Pact for three years, in July 1964. *Mutual Aid Pact Investigation*, 40 C.A.B. 559 (1964). Vice Chairman Murphy dissented in part and member Minetti dissented.

In May 1967, the Pact members again requested CAB approval for extension of the Pact. The CAB ordered an additional evidentiary hearing before renewal. Order E-26000 (1967). Following hearings, the Initial Decision of Examiner Arthur S. Present of March 1969 approved renewal; but before the CAB could render a final decision, the Pact members, in October 1969, made further significant changes to the Pact which:

1. Increased the "supplemental payments" of 25% of normal air transport operating expenses, for flight operations shut down, to:

–50% of such expenses during the first 14 days of the strike;

—45% of such expenses during the next 7 days of the strike;

—40% of such expenses during the next 7 days of the strike;

—35% of such expenses during the remaining days of the strike.

2. Increased the maximum annual liability of every Pact member from one-half of one percent to one percent of air transport operating revenues for the calendar year preceding the strike.

3. Eased entry for new members, lengthened the period for withdrawal notice and provided for more extensive arbitration of disputes.

In July 1970, the Board approved the amended Pact, with members Murphy and Minetti dissenting. Order 70-7-114 (1970). However, in November 1970, the Board, upon reconsideration, vacated that Order and remanded the proceeding to Examiner Present for further evidentiary hearings. Order 70-11-110 (1970).

In December 1970, there was another Pact amendment permitting local service carriers to join the Pact for the first time. As a result of the various Pact amendments, all truck carriers except Delta Airlines, Inc., and all local service carriers, except Allegheny Airlines, Inc. and Southern Airways, Inc., became Pact members, bringing virtually the entire scheduled airline industry together under the Pact.

The reopened hearing before Examiner Present centered on the record of actual experience while the 1969-1970 amendments were in effect. That experience included three

of the longest strikes in airline history—a 119-day National Airlines-Airline Employees Association dispute, a 160-day strike by the Brotherhood of Railway and Airline Clerks against Northwest Airlines, and a 154-day Mohawk Airlines pilot strike. In the four 1970-1971 strikes (National, Northwest, TWA, Mohawk) total Pact benefits were $83,585,000, including $49,688,000 in supplemental payments.

After this evidentiary hearing, Examiner Present issued a decision approving the Pact as not adverse to the public interest or in violation of the Federal Aviation Act, but disapproving the 1969-1970 amendments to the Pact with respect to supplemental payments, increased carrier liability and local service carriers. However, on February 23, 1973, the CAB, although adopting the findings and conclusions of Examiner Present, except as modified or inconsistent with its opinion, approved the Pact and the 1969-1970 amendments for a five-year period, with members Murphy and Minetti dissenting in part. Order 73-2-110 (1973).

On appeal, pursuant to 49 U.S.C. §1486, the Court of Appeals for the District of Columbia held that the Mutual Aid Pact, as amended, was consistent with national labor policy and that the Board's approval of the Pact was based on findings which were adequately supported; it affirmed the decision of the CAB.

The Allied Pilots Association ("the APA") is a labor organization representing only the pilots on American Airlines, Inc. It is not affiliated with any other union nor with the AFL-CIO. Collective bargaining covering American Airlines' pilots takes place directly between the APA and American Airlines.

REASONS FOR GRANTING THE WRIT

POINT I

The Civil Aeronautics Board has assumed congressional powers and exceeded its authority in deliberately altering the balance of economic power between labor and carriers.

Under Section 412 of the Federal Aviation Act, 49 U.S.C. §1382, the CAB was required to disapprove the Mutual Aid Pact if it found the Pact "to be adverse to the public interest, or in violation of this Act * * *." A finding that the Pact violates the Railway Labor Act would require disapproval of the Pact as 49 U.S.C. §1371 expressly requires that carriers comply with the Railway Labor Act as a condition of holding a CAB certificate.

The CAB's approval of the Mutual Aid Pact bears directly and decisively on the fundamental social and political issue of the balance of economic power between labor and management in the airlines industry. The Board's opinion is replete with findings and comments that such is the purpose and effect of its actions. Brief for Petitioner at 6. At the same time the Board has no reservations about the fact that labor relations policy is an area outside its expertise. *Union of Professional Airmen* v. *Shawnee Airlines*, Order 73-3-43 (1973). Although the Board has neither power to direct carrier labor relations nor expertise to pass judgment, it does have a responsibility not to take action which is inconsistent with national labor policy and the courts have the responsibility of enforcing that limitation. *Burlington Truck Lines* v. *United States*, 83 S.Ct. 239,

248 (1962).* During the long course of the proceedings culminating in the present Pact, the Board has never given proper consideration to the unique character o' the Railway Labor Act which is perhaps the most thoroughly and openly negotiated piece of legislation ever enacted.

In testifying on the legislation, Donald R. Richberg, counsel for the Organized Railway Employees, stated:

> "I emphasize at the outset that this is an agreement not in any way as seeming to attempt to coerce your judgment by the fact that the parties here have agreed upon what they are presenting, because they are seeking legislation for which you have your public responsibilities, not for the purpose of in that manner influencing your judgment, but for the purpose of pointing out at the outset the nature of the proposed law which is here presented for your sanction."**

His views were echoed by A. P. Thom, General Counsel of the Association of the Railway Executives, who stated:

> "Mr. Chairman, you will readily appreciate that in reaching an agreement on so controversial a matter as the varying interests between the carriers and their employees naturally present, it was necessary for both parties to make concessions as to what might be inserted in the agreement. Both parties did make concessions. This bill as presented here is not just such a bill as labor would have written if it could write its own bill—it is not such a bill as the carriers would have written if they could write their own bill. But it is the

* Hearings on H.R. 7180 Before the Committee on Interstate Commerce, 69 Cong., 1st Sess., at 9 (1926) [hereinafter cited as 1926 Hearings on H.R. 7180].

** 1926 Hearings on H.R. 7180 at 11.

> view on which they were able finally to agree to present to the Congress of the United States as a method that would work in preventing interruptions of commerce and in preventing any sacrifice of the public's interest."*

Mr. Thom went on to point out how accommodation had been reached between labor and management on specific provisions of the Railway Labor Act:

> "I was saying that there were matters in this bill which were probably not entirely satisfactory to one party, and other provisions in the bill probably not entirely satisfactory to the other. The bill has been brought into existence by a method of give and take. For example, take section 10 of this bill, which relates to the fact-finding body. That was one of the matters most seriously treated in these negotiations and about which there was the most difficulty in reaching an agreement."**

> "We made the concession of not going further in section 10 than it is now written into the law, and we advocate to you that you do not require us to go further, not only as a matter of loyalty to an agreement but as a matter of judgment of what is best for the country.
>
> "We say to you that an agreement between the parties is worth more than any additional coertion you might write into that action * * *."**

If anything, the concern among the Congressmen was that the legislation was so clearly a product of labor-management cooperation that it might foster bargaining agreements at the expense of the public interest. See *e.g.*, colloquy between Senator Dill and D. B. Robertson, President

* 1926 Hearings on H.R. 7180 at 115.

** 1926 Hearings on H.R. 7180 at 116-117.

of Locomotive Firemen and Engineers, 1926 Hearings on H.R. 7180 at 4.

In face of these misgivings Labor and Management urged and Congress heeded the appeal that there be no tinkering with the agreed legislation.

> "Mr. Newton. I agree with you, but I also feel this, that this legislative child comes here sponsored by two rather worthy parents, vouching that it is the best child ever and that 'the child' will work."
>
> "Mr. Thom. Don't put a different child on the doorstep of the public."
>
> "Mr. Newton. And expect it to perform like the original child."*

See also Statement of Donald Richberg, Hearings on S. 2306 Before the Committee on Interstate Commerce, 69th Cong., 1st Sess., at 89 (1926) [hereinafter 1926 Hearings on S. 2306].

Mr. Richberg characterized the final legislative product in the following words:

> "It is all a part of the machinery. You can not write a clause here which will affect a party of this machinery which will not affect the rest of the machinery. You can not write a clause which will affect the operation of a part of the machinery which will not affect the operation of the rest of the machinery. It is just about as wise to add a little to this law on the basis of 'Well, this will not affect the rest of it', as to add to a radio on the same basis. Somebody might come along and say 'You had better add another battery here,' or 'It needs another wire here.' The result will be that you will throw your delicately balanced radio

* 1926 Hearings on H.R. 7180 at 383.

out of commission. *The situation here is that we have a delicately balanced piece of machinery to insure both parties a fair and equal opportunity to press their point of view home to insure adequate public intervention and adequate public pressure on the parties to the agreement"* (*emphasis added*).*

Our primary point is that, without practical expertise or legislative warrant, the CAB has presumed to throw a monkey wrench into that "delicately balanced piece of machinery" which "is the culmination of 81 years of experience with Federal legislation to govern the labor relations" in the railroad and airline industries.** Both by legislative history and by its own terms the first purpose of the Railway Labor Act is "to avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. §152(1). The Board admits that mutual aid payments "may well" prolong interruptions to air commerce but it contemplates other benefits. The right to even make such a judgment is neither the right nor the role of the Board. There is no question but that this Mutual Aid Pact could not be implemented without the affirmative action of the CAB. See Appendix D, Order 73-2-110 at 107-108.

When Congress approved the extension of the Railway Labor Act to the airline industry in 1936, no "mutual aid" pact existed. Congress accepted the industrial balance of economic strength as it existed and cannot be deemed to have delegated to the Civil Aeronautics Board the power to change that balance. Clearly such a change must take

*1926 Hearings on S. 2306 at 182.

**National Mediation Board, Administration of the Railway Labor Act by the National Mediation Board, at 1 (1970).

place by affirmative government—both because of the essential political character of such action and because Congress intended to reserve this kind of power to itself. This was precisely the view of the Board itself when with a different membership and a far more limited Pact before it, it ruled on the *Six Carrier Mutual Aid Pact* in 1969 saying, 29 C.A.B. 168, 173:

> "We next turn to the question whether the agreement threatens, by aggravation of labor disputes to hinder achievement of the objectives set forth in Section 102 of the Federal Aviation Act. The public interest which we must guard, though not broadly one of employee welfare, includes attainment of a degree of stability and efficiency in air transportation that freedom from industrial strife will provide."
>
> "The range of our inquiry, however, is limited to a determination of the effect of the agreement upon these statutory objectives. Matters of general policy as to labor disputes are not to be considered by the Board in assessing whether the agreement is adverse to the 'public interest'. It is the function of Congress, and not of the Board, to weigh the wisdom of such agreements as a factor in the furtherance of labor policies not directly related to the promotion of a sound air transportation system."

The effect of the Board's approval is to encourage, if not force, multi-carrier bargaining in the airline industry. This is contrary to the design for representation which is quite clearly spelled out in the Act or being on a single carrier basis* and results in an expansion of industrial strife and interruption to transportation—the most critical form of commerce.

A multi-employer bargaining unit under the Railway Labor Act is unlawful in the absence of union consent. The

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* Railway Labor Act, as amended 45 U.S.C. §152 (Ninth).

cases make it indisputably clear that consent is an essential prerequisite of multi-employer bargaining. The National Labor Relations Board, for example, has held, with the approval of two Courts of Appeal, that a multi-employer bargaining unit cannot be initially established without the consent of all parties and, moreover, that even where there is a long history of multi-employer bargaining, either the employer or the union may withdraw from the multi-employer bargaining for *any* reason, provided that withdrawal is timely and unequivocal. *The Evening News Ass'n*, 154 N.L.R.B. No. 121 (1965), enf'd., 372 F.2d 569 (6th Cir. 1967); *Hearst Consolidated Publications, Inc.*, 156 N.L.R.B. No. 16 (1965), enf'd, 364 F.2d 293 (2nd Cir. 1966); see also *Multi-Employer Bargaining and the National Labor Relations Act*, 66 Harv. L. Rev. 886, 889 (1953).

Moreover, analogous cases arising under the RLA (involving the obligation to submit disputes to so-called "national handling") indicate: (a) that one party has no absolute right to insist on multi-party bargaining by the other side, *Bhd. of R.R. Trainmen* v. *Atlantic Coast Line R.R. Co.*, 383 F.2d 225, 229 (D.C. Cir. 1967), even where that side (the union in the case just cited) has made identical demands on a number of employers, *id.*, and (b) there may be an obligation to bargain on a multi-party basis, but *only* where the issue on which such bargaining is sought is appropriate for multi-party bargaining *and* where there is a history of multi-party bargaining. *Bhd. of R.R. Trainmen* v. *Atlantic Coast Line R.R. Co., supra*, 383 F.2d at 229; *IAM* v *National Railway Labor Conference*, 310 F.Supp. 905, 911 (D.D.C. 1970). *Chicago, Burlington & Quincy R.R.* v. *Railway Employees Dep't, FFL-CIO*, 301 F.Supp. 603, 607

(D.C. Cir., 1969). In any event, consent (as manifested by past participation) is clearly a prerequisite to any such obligation.

There is no history of multi-employer bargaining with labor organizations representing cockpit personnel, and in particular with Allied Pilots, Association.

Multi-carrier bargaining does not exist in the airline industry although the effect of the Pact is to promote that result. Even under the National Labor Relations Act, multi-employer economic action is only permissible, for "defensive" purpose of "preserv[ing] the multi-employer bargaining basis from the disintegration threatened by the Union's strike action * * *" *NLRB* v. *Truck Drivers Local 449*, 77 S. Ct. 643, 648 (1957); *NLRB* v. *Brown*, 85 S. Ct. 980 (1965); *NLRB* v. *Great Atlantic & Pacific Tea Co.*, 340 F.2d 690 (2nd Cir. 1965).*

The limitations on employer self-help should, if anything, be more stringently applied to carriers covered by the Railway Labor Act. This Court in *Brotherhood of Railway & Steamship Clerks* v. *Florida E. C. Railway Co.*, 86 S.Ct. 1420 (1966), made it plain that carriers under the Railway Labor Act are not relieved of all constraints on their actions because they are engaged in an economic struggle with their employees. In all instances, the public interest is paramount. Certainly in the instant case where the effect of the Pact will be to prolong *and broaden* the

* *Kennedy* v. *Long Island Railroad Co.*, 319 F.2d 366 (2nd Cir. 1963), aff'd, 211 F. Supp. 478 (S.D. N.Y. 1962), *cert. denied*, 84 S. Ct. 75 (1963), approving railroad strike insurance, to the extent it is contrary authority, is distinguishable as action taken in response to selective strikes in a context where multi-carrier bargaining had taken place. See *United Transportation Union* v. *Burlington Northern, Inc.*, 325 F. Supp. 1125 (D.D.C. 1971).

scope of the industrial conflict, the Board's action is directly counter to the purposes of the Railway Labor Act. Even if it could be argued that adding the strength of every carrier in a bargaining dispute otherwise affecting only one, will somehow enhance the prospects of industrial peace, that is not a decision within the competence or power of the CAB. Such a balancing of strength within the industrial relations context is a decision Congress has reserved to itself, lest that finely balanced apparatus which it has wrought with the aid of the parties themselves be turned into junk by technocrats with only a partial view.

POINT II

The CAB arbitrarily applied industry-wide considerations to the petitioner's single carrier status.

The Petitioner, Allied Pilots Association, is an independent Union representing only the pilots employed by American Airlines. APA does not belong to the AFL-CIO; it does not have an affiliation with any other Union; it does not have any agreement—express or implied—with any other Union for mutual support or coordination. Yet in any economic conflict American Airlines will receive the support of virtually the entire industry while APA will stand alone.

All of the arguments we have made with respect to the general impropriety of the Pact apply with even greater vigor to bargaining relationships which are concededly on a "one-to-one" basis. Brief for Petitioner at 13.

The Board wholly ignored APA's position as did the Court below when it was urged there. Because APA is not a giant, its right to independent survival cannot be so

trivially dismissed. Perhaps the reason why APA's position has not been treated lies in the fact that if the Board should acknowledge it, logic commands that the position must be accepted. The premise (faulty, we believe) for the Pact and the Board's approval of it rests on the asserted power of major unions with representation rights on more than one carrier. Presumptuously, the Board contends that this has been an evil overweening power which it must correct. However, if the Board is correct as a general proposition the Pact is consistent with the public interest, then the application of the Pact to APA *must be* inconsistent with the public interest; for the necessary effect of the Pact will be to discourage independent trade unionism and force such organizations as APA to seek, at least, greater coordination with other carrier trade unions. On the basis of the Board's own rationale the application of the Pact to APA is not consistent with the public interest* and is an arbitrary and capricious administrative act.

Conclusion

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

By: /s/ Martin C. Seham

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* The Board *must* disapprove such agreements, Federal Aviation Act of 1958, 49 U.S.C. §1382(b).

APPENDIX A

Decision of United States Court of Appeals (D. C. Cir., 1974)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1214

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

AMERICAN AIRLINES, INC., ET AL
ALLIED PILOTS ASSOCIATION & AIRCRAFT
MECHANICS FRATERNAL ASSOCIATION
FRONTIER AIRLINES, INC.
HUGHES AIR CORPORATION d/b/a HUGHES AIRWEST
NORTH CENTRAL AIRLINES, INC.
OZARK AIR LINES, INC.
PIEDMONT AVIATION, INC.
TEXAS INTERNATIONAL AIRLINES, INC.

No. 73-1229

AIR LINE DISPATCHERS' ASSOCIATION, ET AL,
PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

AMERICAN AIRLINES, INC.
BRANIFF AIRWAYS, INC.
CONTINENTAL AIRLINES, INC.
EASTERN AIR LINES, INC.
NATIONAL AIRLINES, INC.
NORTHWEST AIRLINES, INC.
UNITED AIR LINES, INC.
PAN AMERICAN WORLD AIRWAYS, INC.
TRANS WORLD AIRLINES, INC.
WESTERN AIR LINES, INC.
ALLIED PILOTS ASSOCIATION AND THE AIRCRAFT
MECHANICS FRATERNAL ASSOCIATION
FRONTIER AIRLINES, INC.
HUGHES AIR CORPORATION d/b/a HUGHES AIRWEST
NORTH CENTRAL AIRLINES, INC.
PIEDMONT AVIATION, INC.
TEXAS INTERNATIONAL AIRLINES, INC.

Petitions For Review of an Order of the
Civil Aeronautics Board

Decided August 8, 1974

Robert S. Savelson, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of

court, with whom *Donald J. Capuano* was on the brief, for petitioner in No. 73-1214. *Patrick C. O'Donoghue* and *Martin F. O'Donoghue, Jr.*, also entered appearances for petitioner in No. 73-1214.

William G. Mahoney, for petitioners in No. 73-1229.

Martin C. Seham, of the bar of the Supreme Court of the United States, *pro hac vice*, by special leave of court for intervenor, Allied Pilots Association and Aircraft Mechanics Benevolent Association. *Richard Hibey* and *James P. Davenport*, entered appearances for intervenors Allied Pilots Association and Aircraft Mechanics Benevolent Association.

Glen M. Bendixsen, Attorney, Civil Aeronautics Board for respondent. *Richard Littell*, General Counsel, Civil Aeronautics Board, *O. D. Czment*, Deputy General Counsel, *Robert L. Toomey*, Acting Associate General Counsel, Litigation and Research, Civil Aeronautics Board and *Robert B. Nicholson*, Attorney, Department of Justice, were on the brief, for respondent. *R. Tenny Johnson*, General Counsel, Civil Aeronautics Board, at the time the record was filed and *Warren L. Sharfman*, Associate General Counsel, Civil Aeronautics Board, at the time the record was filed, also entered appearances for respondent. *Howard E. Shapiro*, Attorney, Department of Justice also entered an appearance for respondent.

Charles A. Miller with whom *Robert N. Saylor* and *Eugene D. Gulland* were on the brief, for intervenors trunkline carriers.

Raymond J. Rasenberger and *James L. Devall* were on the brief for intervenors, Frontier Airlines, Inc., et al.

Before: BAZELON, *Chief Judge* and MACKINNON, *Circuit Judge* and CHRISTENSEN,* *United States Senior District Judge* for the District of Utah

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Opinion for the Court filed by *Chief Judge* BAZELON.

BAZELON, *Chief Judge*: Petitioners, who are various groups of airline employees, challenge the CAB's approval of the airlines' Mutual Aid Pact, as amended. They contend that the Pact, as approved, violates the national labor policy, the Railway Labor Act (RLA) and the antitrust laws; and that there is no substantial evidence to support the CAB's finding that the Pact is not adverse to the public interest.

I.

Created in 1958 by six airlines, the Mutual Aid Pact represented a joint effort to soften the impact of strikes against individual companies. At its inception, the Pact provided only for "windfall payments." A strikebound company received payments from other Pact members equal to their increase in revenues resulting from the strike minus their added operating expenses in servicing the new business. The Pact was soon amended to provide for "supplemental payments." This feature enabled a carrier member to receive 25% of its normal air transport operating expenses for operations shut down by the strike. A 1969 amendment to the Pact raised that figure to 50% during the first fourteen days of the strike, dropping by stages to 35% after a strike period of four weeks or longer. The additional payments over windfall to meet this allotment were to be contributed by each member in the proportion which its air transport operating revenues bore to the total revenue for all members. Individual carrier liability for supplemental payments was limited at first to one-half of one percent of the carrier's intake for the prior year. That limitation was upped in 1969 to one percent by agreement of the Pact members.

Both the increase in supplemental payments rates and the higher ceiling on individual carrier liability were

approved in the Board's 1973 order,[1] which followed an initial decision by the Administrative Law Judge refusing to allow the escalations.[2] These elements of the amended Pact are the primary focus of the unions' attack on the Board's action. Petitioners also contest the CAB's consent to a 1971 amendment to the Pact authorizing the participation of local service carriers.

II.

The Supreme Court has recognized the responsibility of transportation agencies like the CAB to make decisions consistent with national labor policy. *Burlington Truck Lines v. United States*, 371 U.S. 156, 173. This responsibility was explicitly recognized in the Board's opinion and is not a matter of dispute on appeal. What is in dispute is the substance of national labor policy relevant to this case.

The national labor policy rests on the principle that parties should be free to marshall the economic resources at their disposal in the resolution of a labor dispute, consistent with the specific rights and prohibitions established by the labor statutes. It is not generally given to government agencies to "regulate what economic weapons a party might summon to its aid."[3] And this principle, of course, underlies the RLA, which is made applicable to air carriers by 45 U.S.C. § 181 and by section 401(k)(4) of the Federal Aviation Act, 49 U.S.C. § 1371(k)(4). That Act does establish certain procedures that must be followed in the direct bargaining

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[1] CAB Order 73-2-110, Feb. 27, 1973, Joint App. 268a.

[2] Initial Decision of Examiner Arthur S. Present, Joint App. 271a.

[3] NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 490 (1960).

process,[4] but once these procedures are exhausted without a settlement, either side is free to resort to economic self-help in an attempt to force a settlement most favorable to it.[5]

This is not to suggest that warfare between unions and the airlines may rage uninhibited under the RLA. Like other substantive labor legislation, the RLA imposes a duty on both employers and employees to bargain in good faith,[6] and it recognizes the right of employers to organize without employer interference.[7] But in this case the CAB specifically noted that "the record is replete with evidence of the earnest and consistent good faith efforts of [the Mutual Aid Pact Members] to find a resolution to their strikes throughout the course of difficult labor negotiations."[8] The Board also points to evidence refuting any notion that the Pact functions as an employer device to control the formation of bargaining units.[9]

The permissibility of the Mutual Aid Pact under the RLA is supported by *Kennedy v. Long Island R.R.*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963). The case involved a union attack on a strike insurance plan in the railroad industry, a device whose similarity to the Mutual Aid Pact in the airlines industry was

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[4] *See* 45 U.S.C. §§ 154-63, 183-85.

[5] *See* Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378-79.

[6] 45 U.S.C. § 152 First.

[7] *Id.* § 152 Fourth.

[8] Opinion of the CAB, Feb. 27, 1973, Joint App. 240a-41a. One instance of an alleged RLA violation by an airline is noted, but it was not shown to have any connection to carrier membership in the Pact. *Id.*, Joint App. 241a.

[9] *See id.*, Joint App. 240a n.14.

specifically noted in the Second Circuit's opinion. In upholding the plan, the court began with the principle set out above and found further support for its result in section 20 of the Clayton Act [10] and section 4 of the Norris-La Guardia Act,[11] which sanction the payment of benefits to parties engaged in a labor dispute. Petitioners' efforts to undermine the rationale of the *Kennedy* decision are unconvincing.[12] We find the Board's approval of the Pact, as amended, fully consistent with the national labor policy and the RLA.

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[10] 29 U.S.C. § 52.

[11] 29 U.S.C. § 104.

[12] Petitioners' argument is based in part on a later holding of the Second Circuit, NLRB v. A. & P. Stores Inc., 340 F.2d 690, that a lockout by employers who were not in the same bargaining unit as the company being struck was violative of the National Labor Relations Act. Petitioners urge that this case implies that multiemployer aid is impermissible except in the context of multiemployer bargaining units, which presently do not exist in the airlines industry. *A. & P.* is easily distinguished from *Kennedy* in that the court's result in *A. & P.* turned on a finding that the lockout violated section 8(a) (1) of the NLRA as a device to force the unions to accept multiemployer bargaining units. As we have noted, text accompanying note 9 *supra*, the Pact does not appear to have such coercive tendencies.

The unions also resort to *Brotherhood of Railway & Steamship Clerks v. Florida East Coast R. Y.*, 384 U.S. 238 (1966), which held that during a strike period a railroad could make some alterations in its contracts with the unions without submitting these alterations to the lengthy negotiations procedures required by the Act. The unions attempt to read into this case a principle limiting the use of employer self-help whose effect is to prolong strikes. In fact, the decision vindicates the right of self-help in the face of the technical requirements of the Act by allowing the employer to make adjustments necessary for continued operations during the strike subject only to approval by the district court.

III.

There is no indication either in the initial opinion of the Administrative Law Judge or in the CAB's opinion that the unions presented their antitrust objections to the Pact in the proceedings before the agency. As a technical matter, therefore, we are precluded from considering the antitrust attack absent any reasonable grounds for failure to pursue that attack before the CAB.[13] As a practical matter, we cannot exercise an appellate function in the review of administrative matters unless the problems have been fully aired and focused in the proceedings below. The Federal Aviation Act (FAA) specifically exempts agreements approved by the CAB from the operation of the antitrust laws.[14] The initial forum in which to raise antitrust objections remains the agency which is charged with the primary determination of the public interest.[15]

IV.

In passing on agreements among air carriers under 49 U.S.C. § 1382, the CAB is required to disapprove any

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[13] 49 U.S.C. § 1486(e) provides:

> No objection to an order of the Board . . . shall be considered by the court unless such objection shall have been urged before the Board . . . or if it was not so urged, unless there were reasonable grounds for failure to do so.

[14] 49 U.S.C. § 1384.

[15] In prior rulings, the CAB has dealt with antitrust objections to the Pact. *See, e.g.*, Opinion of the CAB, July 10, 1964, Joint App. 44a, 66a-67a. It concluded that the Pact "has not operated in restraint of trade or lessened competition between air carriers . . . ." However, we do not consider these prior rulings, or the findings which they contain, to be proper subjects of review at this juncture. *See* 49 U.S.C. § 1486(a) (precluding appeals from orders of the CAB after 60 days of decision except by leave of court on a showing of reasonable grounds for failure to file in timely fashion).

agreements which it finds to be "adverse to the public interest." The courts may not overturn the CAB's findings of fact unless they are unsupported by substantial evidence on the record.[16] Nor may they upset the final judgments of the CAB unless they fall outside a zone of reasonableness.[17] It is urged, however, that because the CAB lacks expertise in labor matters, its decisions impinging on the activities of unions in the airlines industry are to be accorded less weight than these standards imply, although petitioners fail even to articulate an alternative standard.[18]

The CAB is not a labor board, of course, as it is first to concede.[19] Yet we have already concluded that its decision in this case is consistent with national labor policy, such as it may be discerned. Beyond that, a proper evaluation of the Pact's effect on the unions and their members necessarily involves a firm grasp of industry practices under the agreement, and the CAB's grasp has reason to be firm. Against a background knowledge of the industry's economic structure, the CAB has monitored the Pact since its inception sixteen years ago and has the benefit of three full evidentiary hearings conducted on the Pact in 1962, 1966 and 1970.[20]

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[16] 49 U.S.C. § 1486(e): "The findings of fact by the Board . . . , if supported by substantial evidence, shall be conclusive."

[17] *See, e.g.*, American Airlines, Inc. v. CAB, 98 U.S. App. D.C. 348, 354, 235 F.2d 845, 851 (1956).

[18] Brief for Petitioner Air Line Pilots Ass'n, Int'l at 8-9.

[19] Brief for Respondent CAB at 16.

[20] *Cf.* National Aviation Trades Ass'n v. CAB, 136 U.S. App. D.C. 367, 372, 420 F.2d 209, 214 (1969) (endorsing CAB's competence to make findings relevant to antitrust factors despite its lack of expertise as such in the antitrust field).

Despite the CAB's experience with the Pact, we would not affirm, of course, if issues of employee welfare had been ignored or slighted. This court has previously pointed out "the Board's duty to consider the welfare of carrier employees under the public interest standard when it approves agreements under Section 412."[21] But in a finding that the unions do not dispute, the Board in this case declared

> that the employees retain substantial and effective bargaining power regardless of the Mutual Aid Agreement. Thus, the record shows that air carrier wages . . . are higher than, and . . . have increased faster than, wages in other industries, including other transportation industries.[22]

We do not think the Board need have gone further in this respect.

In assessing the net impact of the Pact and its new amendments, the CAB also took into account, *inter alia*: the industry's vulnerability to strikes; the tendency of the Pact, as amended, to promote or prolong strikes; and the impact which the agreement has on the viability of marginal companies. Since the basis of the CAB's findings on each of these points is vigorously attacked by the unions, we will review in some detail the evidence on which the Board bases its findings.

The Board found that the air transport industry "suffers a greater impact by strike than do other industries, and is therefore more vulnerable to strike[s] . . . than are other industries." The unions claim that this finding is based on a misreading of the testimony of Dr. Herbert R. Northrup of the Wharton School of the University

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[21] Air Line Pilots Ass'n, Int'l v. CAB, 154 U.S. App. D.C. 316, 321, 475 F.2d 900, 905 (1973).

[22] Opinion of the CAB, Feb. 27, 1973, Joint App. 234a-35a.

of Pennsylvania.[23] On our reading of the statement, Dr. Northrup seems quite explicit that airlines—like other service industries in which the ability to stockpile is limited—are particularly vulnerable to strikes and furthermore that they are more vulnerable to strikes than other transportation industries with a higher percentage of freight traffic, which can be stored pending settlement.[24] In defending the peculiar suitability of the Mutual Aid Pact for the airlines industry, the Board did not purport to find that air carriers were more sensitive to work stoppages than *all* other transport industries; nor was such a finding necessary.

The two remaining findings of the Board which come under special fire are: (1) that the Pact, as amended, is not likely to have a serious impact on the willingness of companies to sustain or prolong strikes; (2) that the payments required by the Act do not and are not likely to affect the viability of small or economically marginal airlines. These findings are defensive in nature. They are central to the Board's answer to allegations that the Pact poses risks to the stability and smooth operation of the airlines system which outweigh the benefits on which we have touched. If either finding were unsupported, we would have difficulty in countenancing the Board's decision. But we do not so conclude.

Although the CAB followed the Administrative Law Judge's view that "the record does not establish that any carrier has incurred or prolonged a strike because of the increased level of mutual aid," [25] it differed from his assessment of a substantial danger that the amended

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[23] Trunkline Carrier Exhibit No. 80.

[24] *Id.* 11-12.

[25] Initial Decision of Examiner Arthur S. Present, Joint App. 301a.

Pact *would result* in significantly longer and more frequent work stoppages. In concluding that this risk was not substantial, the Board noted the relative infrequency with which negotiations in the airlines industry have erupted into strikes in recent years. The statistics cited cover the period from 1968-1971, during at least part of which the new amendments were actually in effect.[26]

The CAB's finding on the prolongation issue is further supported by the Board's determination that significant financial pressures to settle remain on the airlines despite their participation in the Pact. The unions point out that in 1970 some airlines actually experienced operating profits during periods of strike when supplemental payments under the Pact were taken into account. But the Board reasonably believed that in assessing the dynamics of the companies' position during strikes, operating profits should be compared to "normal profits" for a similar period—profits which the company would have enjoyed if it had not sustained a strike. Similarly, it included in its model "post-strike losses." These take in the cost of resuming operations, losses attributable to the absence of advance bookings and "the long-term loss of traffic attributable to the loss of carrier identity in the market . . . ." [27]

Clearly "normal profits" and "post-strike losses" are based to some degree, as petitioners assert, on "speculation and hypothecation," [28] but the absence of certainty does not preclude the Board from making a considered

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[26] Ironically, the unions cite the same statistics in their attempts to refute the CAB's findings on the strike prolongation issue. Brief of Petitioner Air Line Dispatchers' Ass'n at 40. This would seem to ignore that the Pact was in effect during the entire period covered by the figures.

[27] Opinion of the CAB, Feb. 27, 1973, Joint App. 236a.

[28] Brief of Petitioner Air Line Dispatchers' Ass'n at 30.

judgment on the best information available. One could wish that the Board had addressed itself to the methodological problems inherent in estimating these loss factors: it simply stated that it considered the companies' figures to have been "reasonably estimated" and adopted them as its own.[29] Yet the unions do not point to evidence that the companies reached their estimates by misguided or meritricious methods. And the CAB did seek to control the risk of error by limiting its approval of the agreement to a period of five years. Thus, if the CAB's "hypothecations" prove wrong, they may be corrected.

The Board also found that the Pact offers no significant threat to the financial stability of its members. Although the Administrative Law Judge reached a different assessment of the risk involved, he believed the record did not "demonstrate that the viability of any carrier has been critically threatened because of the higher level of contributions required under the amended agreement."[30] The CAB reinforced its own evaluation by reference to the amounts paid out by various airlines as compared with strike losses incurred.[31] These statistics cover the period from January 1970 to June 30, 1971, when the new higher ceilings were in effect. The Board concluded, not unreasonably, that the payments are not out of proportion to the gains from the protection offered. The balance of costs and benefits in favor of allowing the agreement was found to be particularly true for financially weak carriers, which stand to lose most

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[29] These methodological problems do receive extensive treatment by company experts on the record. *See* Trunkline Carrier Exhibit Nos. 50-52. Presumably these discussions provided the basis of the CAB's acceptance of the estimates.

[30] Initial Decision of Examiner Arthur S. Present, Joint App. 301a.

[31] Opinion of the CAB, Feb. 27, 1973, Joint App. 243a-44a.

from strikes or threats of strike.[32] This line of justification also supports the Board's approval of the 1971 amendment allowing local service carriers to join the Pact, for these carriers, as a group, are likely to be less stable, and therefore more vulnerable to strikes than trunkline carriers.

Of course, the ceiling imposed by the Pact provides some safeguard against oppressive payments. And although liability for windfall payments may bring a carrier's total obligation to more than one percent of its operating revenues, the Board argues correctly that the windfall payments represent no added burden to the company which must pay them, because they represent only profits which the company could not have expected to enjoy absent the strike suffered by its competitor.

We conclude that the findings on which the Board rests its decision are adequately supported and that the result reached is a reasonable one.

V.

We have carefully considered the unions' remaining contentions.[33] We believe that only one warrants discussion. The unions say the CAB erred in failing to adopt a condition that would have precluded consideration of amounts paid out under the Pact as expenses for the purpose of establishing rates. As the CAB recognized,[34] the petitioners are seeking to pursue this issue in the wrong procedural context. The authority of the Board to review and prescribe air carrier rates is ex-

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[32] *Id.*, Joint App. 245a.

[33] These include a claim of bias on the part of CAB, which we deem without substantial foundation.

[34] The CAB refused to take evidence on this point. Brief of Petitioner Air Line Pilots Ass'n, Int'l at 72.

ercised in distinct proceedings under the FAA.[35] If the unions feel that the rates charged by the airlines are unreasonable because they include allowances for payments under the Pact, they may institute proceedings before the CAB under 42 U.S.C. § 1482(d). Petitioners suggest that their objection would be "buried" in a rate-making proceeding.[36] If this should happen, and if the unions are so advised, they may seek judicial review.[37]

Affirmed.

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[35] 49 U.S.C. § 1482(d).

[36] *See* Brief of Petitioner Air Line Pilots Ass'n, Int'l at 72.

[37] *See* 49 U.S.C. § 1486(a).

APPENDIX B

Airlines Mutual Aid Pact
Order 70-7-114 (July 23, 1970)

Opinion of the Board

Opinion of Chairman Browne, Concurring

Opinion of Members Minetti and Murphy, Dissenting

Initial Decision of Examiner Arthur S. Present (1969)

ALAN OSTER for Allied Pilots Association.

HERBERT A. ROSENTHAL and ALEXANDER N. ARGERAKIS for the Bureau of Operating Rights, Civil Aeronautics Board.

Opinion

BY THE BOARD:

Once again the Mutual Air Agreement, providing for inter-carrier financial assistance in certain types of strikes, is before the Board. The original Agreement was approved, effective for one year, in 1959,[1] and an amended Agreement was approved in 1964 for a period of three years.[2] Seven carriers then parties to the Agreement applied for renewal of the amended Agreement, and the matter was assigned for hearing before Examiner Arthur S. Present. In his initial decision of March 7, 1969, the examiner found that the Agreement is not adverse to the public interest or in violation of the Act and should be approved for an indefinite period subject to conditions. We granted review, and briefs and oral argument have been received on behalf of the Carrier Parties,[3] the Six Union Parties,[4] and the Air Line

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[1] Six-Carrier Mutual Aid Pact, 29 C.A.B. 168, reconsideration denied, 30 C.A.B. 90 (1959).

[2] Mutual Aid Pact Investigation, 40 C.A.B. 559 (1964).

[3] The seven carrier parties to the proceeding are American Airlines, Braniff Airways, Eastern Air Lines, Northwest Airlines, Pan American World Airways, Trans World Airlines, and United Air Lines. Pursuant to amendments to the Agreement adopted as of October 31, 1969, Continental Air Lines, National Airlines, and Western Air Lines have joined.

[4] The Air Line Dispatchers Association, the Brotherhood of Railway and Steamship Clerks, the Communication Workers of America, the Flight Engineers International Association of Machinists and Aerospace Workers, and the Transport Workers Union of America.

Pilots Association, International (ALPA). In addition Mohawk Airlines and North Central Airlines filed a joint brief as *amici curiae* and participated in oral argument.

In addition to review of the initial decision, there are two developments occurring since its issuance which must be considered here. First are amendments to the Agreement entered into as of October 31, 1969. Second is the request of Mohawk and North Central that the Board withhold approval of the Agreement until appropriate steps are taken to assure the participation of these carriers and any other local service carrier in the Agreement at issue or a comparable one with terms at least as favorable and with participation by the same trunkline carriers.

Upon consideration we find that the Agreement, both in the form passed on by the examiner and as amended on October 31, 1969, should be approved for an indefinite period subject to the conditions imposed by the examiner and that the request of Mohawk and Lake [*sic*] Central should be denied.

The Agreement considered by the examiner is summarized in the initial decision at page 2 and is set forth in full in Appendix A to the initial decision. Its terms were also discussed in detail in the Board's prior decision.[5] The Agreement, in brief, provides that if a specified type of strike occurs, non-struck carriers shall pay a struck carrier or carriers "windfall" payments, the increased revenues attributable to the strike, plus "supplemental" payments, if the windfall payments do not equal 25 percent of the struck carrier's normal operating expenses. While we shall, subsequently, compare terms of this Agreement affected by recent amendments, no further discussion of its provisions appears warranted.

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[5] 40 C.A.B. at 573-577, 599-600.

Opinion

As indicated above, the examiner concluded that the Agreement is not adverse to the public interest or in violation of the Act and should be approved for an indefinite period subject to conditions. His principal findings underlying this conclusion are that the Agreement is fully consistent with national labor policy; that developments since the prior proceeding further support the contribution of the Agreement to airline stability; that the evidence establishes that the Agreement has had little, if any, impact on labor-management relations; and that the evidence does not show that the pact has had any material effect upon the collective bargaining process.

We have carefully considered the contentions of the parties in the light of the record and find that we are in agreement with the examiner's decision, except as to the relatively minor aspects noted below. Accordingly, except to the extent modified herein, we adopt as our own the findings and conclusions of the examiner as contained in the initial decision attached hereto as an Appendix.

The contentions of the Six Union Parties and ALPA in opposition to the Agreement addressed to the Board are substantially the same as those raised with the examiner. His treatment of these contentions is comprehensive and thorough, and we shall consider here only (1) those contentions involving the Agreement approved by the examiner which we feel justify further discussion, (2) issues relating to the October 31, 1969 amendments, and (3) the question of exclusion of local service carriers.

Opinion

I.

As before, an attempt is made to demonstrate by statistics that the Agreement has contributed to industrial strife and strikes. Referring to Carrier Exhibit 20, the Six Union Parties point to the fact that during 110 months prior to the Agreement there were 40 strikes and that during an equivalent period under the Agreement there were 42,[6] an incident increase of 5 percent. Further, they calculate that there were 514 strike days lost during 110 months prior to the Pact and 612 for an equivalent period under the Pact, an increase of 17 percent. The Six Union Parties are also critical of the examiner's comparison of strikes against parties to the Agreement as against strikes against nonparticipating carriers. They assert that the comparison is arbitrary and unexplained and that the statement that such a comparison discloses no important difference in the number of strikes or duration thereof is erroneous on the basis of the data employed and is supported only by a juggling of the data.

As the Board has previously held, "the bare fact that there may have been a deterioration in labor-management relations during the period of operation of the Pact covered by the record does not raise a presumption that the deterioration was caused by the Pact and such fact, standing alone, does not make out a 'prima facie case' that the Pact violates the public interest."[7] In our view the figures relied upon by the Six Union Parties do not make out such a prima facie case. There is no such marked upsurge in the incidence or length of strikes as to lead to any allowable inference that the Agreement is responsible for either.

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[6] Omitted are strikes against BOAC and Quantas [*sic*].

[7] 40 C.A.B. at 562-563.

This is particularly the case in the context of the entire record which does not show that the Agreement has had any material effect upon the collective bargaining process. Moreover, the comparisons made by both the Six Union Parties and the examiner to reach opposite results rely on unweighted data[8] which, in our judgment, are of insufficient probative value to reliably indicate either that the Agreement has or has not contributed to industry strife and strikes so as to adversely affect the public interest.[9] Finally, even if we were to indulge in the assumption that the increases in the number and length of strikes were caused by the mutual aid pact, these increases have not been of such magnitude as to have resulted in a qualitative adverse change in labor relations, offsetting the contributions to that stability which the Agreement brings.

The Six Union Parties characterize as a "myth" the examiner's conclusion that the airlines involved need the financial stability provided by the mutual aid agreement. They argue that in 10 years Pact members incurred a total strike loss of 246 million dollars of which 82 million was made up of Pact payments, leaving a final loss of 164 million dollars. Of this, some 116 million dollars, or 70 percent, was lost in the 1966 IAM strike. "Yet," they state, "it is clear in terms of the financial stability

[8] As to duration of strikes, the data do not distinguish among strikes against trunk carriers, all-cargo carriers, local service carriers, helicopter carriers, or foreign air carriers, although the Six Union Parties do exclude the latter from their figures. As to incidence, each strike is given equal weight regardless of the duration of the strike or the type of carrier struck.

[9] Accordingly, we do not adopt the examiner's statement, on the basis of the data, that the Agreement has not led to increased labor strife or the statistical comparisons employed by him in this connection. (I.D. 24-25).

of the airlines involved that they would have been much better off to have met the original IAM demands without quibbling than to follow the course they did." But the argument assumes an unsubstantiated predicate—that if there had been no Pact, there would have been no strike. We find, as did the examiner,[10] that the record does not support the claim that the availability of mutual aid was the determinative factor in inducing the carriers to take the 1966 strike.[11]

ALPA argues, among other things, that the Pact as applied to it is inconsistent with the national labor policy[12] and violates the Railway Labor Act. The examiner rejected the argument,[13] we believe correctly, but additional discussion is appropriate because ALPA has cited to us cases not cited to the examiner.

ALPA asserts that, contrary to the initial decision, court decisions in cases involving multi-employer economic activity against employees have limited its permissible scope to action which is (1) confined to a multi-employer

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[10] I.D. 35.

[11] It may be noted also that we do not read the initial decision (I.D. 35-37), as do the Six Union Parties, as criticizing union refusal to accept the 3.2 percent offer. In any event, we neither criticize nor endorse this refusal.

[12] The examiner concluded that the Board must heed the national labor policy, and it must accomodate the objectives of the Act to the purposes of the national labor policy (See I.D. 10-13). The Six Union Parties contend that the examiner erred in considering national labor policy, citing certain dicta in the 1959 decision (29 C.A.B. at 173). While there is language in the first Board opinion that matters of general policy as to labor disputes are not to be considered as a public interest factor, it is clear from the opinion on reconsideration as well as the 1960 decision that the Board has always regarded as a relevant consideration whether the Agreement is consistent with national labor policy (See 30 C.A.B. at 92; 40 C.A.B. at 562, 609-610).

[13] I.D. 14-17.

bargaining unit, and (2) only for purposes of protecting the multi-employer bargaining unit in the face of union activity directed at its common front or integrity. The reach of the decisions cited by ALPA is far from sustaining its position that, since the airline industry does not bargain as a unit with ALPA, any multi-employer economic action—and specifically mutual aid—is unlawful as applied to it.

Three decisions cited by ALPA hold that a lockout by all members of a multi-employer bargaining group in response to strike against one member is lawful.[14] But none of these cases hold that multi-employer economic action is lawful only for purposes described by ALPA, nor do they even discuss the question. In *NLRB* v. *Great Atlantic & Pacific Tea Co.*,[15] the Court of Appeals for the Second Circuit, in an opinion by Judge Kaufman, held that a lockout by an employer group violated the National Labor Relations Act. Since the employees had not committed themselves to industrywide bargaining, it was found the employers' conduct lost the protective quality which would otherwise justify the lockout[16] and instead assumed the character of an offensive weapon which would unfairly advantage the employers in their demands for a multi-employer unit.

It is a very long step—and one we are not prepared to take—to conclude that because the lockout in the *A&P* case violated section 8(a)(3) and (7) of the National

[14] NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87 (1957); NLRB v. Brown, 380 U.S. 278 (1965); International Ass'n of M. & A. W. v. National Ry. Labor Conf., 310 F. Supp. 905 (D.C.D.C., 1970).

[15] 340 F. 2d 690 (C.A. 2, 1965).

[16] See NLRB v. Truck Drivers Local Union No. 449, *supra*.

Labor Relations Act,[17] the Mutual Aid Agreement violates the Railway Labor Act.[18] There is no evidence whatsoever that the Agreement in any way infringes on the right of employees to organize and bargain collectively through representatives of their own choosing under Section 2, Fourth; or requires any person seeking employment to sign a contract or agreement prohibited by Section 2, Fifth; or obstructs carrier-employee agreements sanctioned by Section 2, Eleventh. Nor are there any facts or circumstances set forth by ALPA from which a *per se* violation may be inferred.[19] Moreover, we do not, as does ALPA, construe Judge Kaufman's opinion in the *A&P* case as qualifying in any degree his opinion in *Kennedy* v. *Long Island Railroad Company*[20] upholding the legality of the railroads' strike insurance plan. Accordingly, we find that ALPA's arguments are without merit.

For the foregoing reasons and those set forth in the initial decision, as modified herein, we conclude that the Agreement which was the subject of the renewal proceeding should be approved. We next consider the Agreement as subsequently amended.

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[17] These sections provide, respectively, that it shall be an unfair labor practice for an employer (1) to interfere with, restrain or coerce employees in the exercise of the rights of employees as to organization, collective bargaining, etc. and (2) by discrimination in regard to hire or tenure of employment or any terms or condition of employment to encourage or discourage membership.

[18] The only sections of the R.L.A. cited by ALPA in this connection are Sections 2, Fourth, Fifth and Eleventh, covering rights similar to those referred to in the previous footnote.

[19] See *Kennedy* v. *Long Island Rail Road Company*, *infra*.

[20] 319 F. 2d 366 (C.A. 2, 1963), *cert. den.* 375 U.S. 830 (1963).

II.

By letter of October 31, 1969, filed in this docket, the Carrier Parties advised the Board that as of that date they had agreed to several amendments to the Agreement. Previously, they noted, in the event of strikes covered by the Agreement, the other struck members paid their net windfall revenues to the struck carrier or carriers and, in addition, made supplemental payments to the extent necessary so that the receipts of the struck carrier or carriers would equal 25 percent of normal operating expenses for the operations shut down by the strike. The amendments increase the level of supplemental payments to 50 percent of the struck carrier's normal operating expenses during the first two weeks of the strike, 45 percent for the third week, 40 percent for the fourth week, and 35 percent for any period thereafter. The amendments also increase the annual maximum liability of any carrier for supplemental payments from one-half percent to one percent of its air transport operating revenue for the previous calendar year.[21]

Other principal features of the amendments to the Agreement include:

(1) Alteration of the conditions of entry to permit any trunk carrier to join the Agreement by November 15, 1969, without a waiting period or back payment.

(2) Modification of the conditions of withdrawal to provide that withdrawal may take effect at the end of

[21] Except that the parties may agree at any time in writing that the liability for additional payments in a particular calendar year shall be subject to a higher percentage limitation, in which event any carrier that thereafter joins the Agreement shall be subject to such Agreement to increase liability in the calendar year in which its adherence becomes effective.

any calendar year beginning December 31, 1972, provided that one-year's notice of withdrawal be given.

(3) Modification of the arbitration clause to provide that disputes concerning the amount of any payment shall be subject to arbitration. Previously, only disputes over the requirement to make or the right to receive payment were subject to arbitration.

On December 2, 1969, the Agreement, in substantially the same form as attached to the letter, was formally filed under section 412 of the Act (C.A.B. 21445). In their brief, the Carrier Parties state that pursuant to the foregoing amendments, Continental, National, and Western have joined the Agreement, the latter's adherence becoming effective August 3, 1970.

In response to the carriers' notice of amending the Agreement, the Allied Pilots Association renewed their request that the Agreement not be approved with respect to American Airlines. A request of the Six Union Parties, supported by ALPA, to remand this proceeding for further evidentiary hearings on the amended agreement was deferred.[22]

We have decided to pass on the amended Agreement at this time without remand. Lengthy proceedings have been had on two earlier versions of the Agreement, and there has been thorough exploration of the basic issues affecting the public interest in each proceeding. Moreover, it has not been demonstrated why a further hearing is necessary or what new facts would be brought out on remand. We, therefore, do not believe that the public interest, or the proper dispatch of the Board's work, would be served by further hearings on the latest version. We have before

[22] Order 70-1-100.

us, we believe, sufficient facts on which to predicate a judgment as to whether the amended Agreement is adverse to the public interest or in violation of the Act. We conclude that the amended Agreement should be approved.

The Carrier Parties assert that several factors necessitated the increase in the protection provided by the recent amendments. Briefly, it is asserted that: (1) strike losses have continued to mount; (2) the financial ability of airlines to withstand strikes has significantly deteriorated; (3) the prior level of supplemental payments was insufficient to enable the carriers to resist excessive and highly inflationary union demands; (4) the effectiveness of Mutual Aid is directly related to the number of trunklines participating in it: membership of all principal competitors of a struck carrier greatly strengthens the "windfall" provisions, and the availability of protection to virtually all trunklines adds significantly to the industry's ability to resist excessive demands. In their brief, the Six Union Parties contend that the carriers' arguments are nothing more than a claim that failure justifies more extended efforts, and the carriers appear to have become "boxed in" by their own past failures and the inability to back up and take a good look at the situation and find some other course. Further approval, they assert, "will simply be one more step on the road to escalation of industrial warfare, one more step into the mess from which the air carriers and the Board will find it increasingly difficult to extricate the industry, and one more step on the road to disaster."

This baleful prophecy is accompanied by no facts. There is no record support for the supposition that the Agreement considered by the examiner resulted in an "escalation of industrial warfare," and there is no reason to believe that the amended Agreement will have any such result.

Opinion

While the recent amendments strengthen the Agreement, they do not change its basic nature or add any new element which suggests that it, unlike its predecessors, is adverse to the public interest. Thus, in light of the record compiled with respect to the previous Agreement, we are unable to conclude that the amended Agreement will induce strikes or exacerbate labor-management relations or create an imbalance in the collective bargaining process so as to pose a threat to the attainment of the public interest objectives of the Act.[23] Further, as in the case of the prior Agreements submitted to the Board and for the reasons previously assigned, we find that the amended Agreement is consistent with national labor policy and violates neither the Federal Aviation Act nor the Railway Labor Act.

As to the positive contribution of the amendment Agreement to airline stability, we have had occasion recently to take note of the accelerated cost pressures on the carriers and the marked decline in their earnings and profit margins.[24] In its 1964 opinion the Board stated: "The Part offers, at a not unreasonable cost for the protection obtained, a substantial measure of relief against the costs of strikes, in this fashion and to this extent contributing to industry stability."[25] The cost of protection is still not unreasonable,[26] in light of their deteriorated financial position the need for protection is greater, and the cost of

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[23] See 29 C.A.B. at 173-174.

[24] Order 69-9-68, September 12, 1969.

[25] 40 C.A.B. at 561.

[26] The liability of any carrier for supplemental payments is limited to one percent of its air transport revenues for the previous calendar year.

strikes has increased sharply.[27] What was said concerning the contribution of the prior Agreement to air carrier stability applies with greater force today. We recognize that the new Agreement will provide substantially greater recoupment of strike losses, particularly in the case of short strikes when maximum benefits will be provided.[28] However, for the reasons set forth above, we do not believe that this factor overrides the favorable aspects of the Agreement. Furthermore, it hardly seems reasonable to believe that a carrier will risk a strike on speculation that the strike will be short and that the carrier will realize the maximum benefits. Carriers must, under the new Agreement, as under the old, face the prospect that in all probability mutual aid will not meet their strike losses. Finally, the possibility of permanent diversion of traffic to competing carriers will serve as a positive incentive for carriers to avoid strikes.

For the foregoing reasons we shall approve the amended Agreement, subject to terms imposed with respect to the prior Agreement and for an indefinite period for the reason given by the examiner in his decision on the prior Agreement.[29]

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[27] During the period 1961-1966, carriers struck two or more times have experienced the following strike losses per day: Eastern: 1961—$466,000; 1962—$300,000; 1966—$606,000; Pan American: 1961—$523,000; 1964—$356,000; 1965—$585,000; TWA: 1961—$386,000; 1966—$1,363,000; United: 1963—$336,000; 1966—$1,422,000. (Carrier Exh. 32).

[28] As noted previously, a struck carrier receives 50 percent of normal operating expenses for the first two weeks, with a 5-percent tapering off in each successive week until a 35-percent level is reached.

[29] The signatories to the Agreement are cautioned that our approval does not extend to any agreement entered into pursuant to Paragraph 1(B)(2) raising a party's liability for supplemental payments in any calendar year beyond one percent of a party's air transport revenues for such prior calendar year.

III.

We turn finally to the request of Mohawk and North Central that the Board withhold approval of the new Agreement until appropriate steps are taken to assure the participation of local service carriers in the Agreement or in a comparable one with terms at least as favorable and with participation by the same trunkline carriers. The Six Union Parties and ALPA oppose the participation of local service carriers. The Carrier Parties urge that the Board approve the Agreement, and they state that after this is done, the trunk carriers are prepared to turn to the question of local service participation.

The request of Mohawk and North Central will be denied. The exclusionary provision in the new Agreement is the same as that in the Agreement considered in the renewal proceeding. Yet the two carriers did not seek to intervene until nine months after the initial decision issued. We denied this request for intervention on the ground that the petition was untimely and that grant of intervention at that stage would not be conducive to the orderly conduct of the proceeding.[30] While the carriers were permitted to file a statement in the nature of an *amicus curiae* brief, it was to be limited to the question of whether the Board should approve that portion of the Agreement which limits participation in the Agreement to trunkline carriers. The relief requested, however, appears to go beyond this issue, and to withhold approval of the Agreement, as they ask, would be no more conducive to the orderly conduct of the proceeding than would their intervention have been.

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[30] Order 70-1-100.

Moreover, on the issue on which Mohawk and North Central have been permitted to be heard, they have not shown that the exclusionary provisions of the Agreement are anti-competitive in their purpose or effect, or that they or local service carriers generally have been prejudiced by it. On the very scant record before us on the question we are not prepared to find that the provision is adverse to the public interest.

We are also mindful of the fact that Mohawk and North Central speak only for themselves and not for local service carriers generally and that the trunk carrier parties do not oppose in principle local service participation. This is a matter which may well be considered by the two segments of the industry and our decision denying the request of Mohawk and North Central is without prejudice to any future agreement of this nature which may be filed.

We have given due consideration to all the contentions of the parties, and find, except to the extent indicated, that they do not alter our decision herein.

Accordingly, in view of the foregoing and all the facts of record, it is found that the Mutual Aid Agreement, including the amended Agreement filed on February 5, 1970, is not adverse to the public interest or in violation of the Act and should be approved, subject to the following conditions:

1. The approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act;

2. The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

excluded from the agreement, that Mohawk and North Central are late comers to this proceeding, and deferral of action on this agreement is unnecessary to afford them relief, and that the trunkline carriers are committed to extending full consideration to local service carrier participation in the agreement.

Under section 412 of the Act, the Board may always reconsider approval of an agreement if the facts indicate that continuing approval is adverse to the public interest. Mohawk and North Central are free to bring the issue before the Board at a later time if the trunkline carriers fail to afford them the proper consideration.

MURPHY and MINETTI, Members, Dissenting:

The record before the Board is incomplete and we would remand the case to the examiner for further proceedings. The agreement as submitted to the examiner involved seven trunkline carriers. It provided that "windfall" payments would be supplemented where necessary to provide a struck carrier with 25 percent of its normal operating expenses and that the annual maximum liability of any one carrier for supplemental payments would be limited to ½% of its operating revenues for the previous year.

However, subsequent to the initial decision, the carriers changed the agreement in three significant respects. The number of trunk carriers covered by the agreement was expanded so that the agreement is now essentially an industry-wide pact among trunk carriers.[1] The amount of supplemental payments to a struck carrier has been doubled to a full 50% of its operating expenses for the initial period of a strike and finally, the liability of each non-struck car-

[1] Only Northeast and Delta are outside the agreement and Northeast is seeking to merge with Northwest which is a pact member.

rier for supplemental payments has been doubled. The Board is now being asked to approve not the agreement which was before the examiner but a significantly revised version of that agreement. In our view, there is insufficient reliable or probative evidence before the Board upon which to judge whether the new agreement is or is not adverse to the public interest.

As the majority recognizes, the new agreement provides substantially greater recoupment of strike losses by the carriers than would the earlier agreement particularly in the first stages of a strike. In fact, if the present agreement had been in effect from the beginning, it appears that the struck carriers would have received mutual aid benefits in *excess* of their actual strike losses in at least five of the 18 strikes occurring during the period 1958-1968 on which cost information is contained in the record.[2] There is a serious question, therefore, whether the rate of payments under the new agreement is not set at so high a level as to encourage a carrier to accept a work stoppage rather than settle a labor dispute. Some affected parties contend there is a point at which supplemental payments would be high enough to have such an effect and we believe this aspect of the revised agreement, among others, must be fully explored before an examiner. In our view, basic concepts of administrative due process require no less.

We cannot join the majority in approving the agreement with these new provisions for an indefinite period of time solely on the basis of a record compiled in the light of significantly different provisions and the self-serving briefs by the parties.

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[2] See carrier exhibit 33.

ORDER

A full public hearing having been held in the above-entitled proceeding in Docket 9977 and argument having been received with respect to Agreement CAB 21445, and the Board, upon consideration of the record and the submission made, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That Agreement CAB 12633, as amended by Agreements CAB 12633A1 through A8, and Agreement 21445 (either hereinafter referred to as the "Agreement"), be and they hereby are approved, subject to the following conditions:

(a) The approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act;

(b) The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

(c) In accounting for the amounts due to others and the amounts due from others under the Agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by Part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating

to the operations of the Agreement as may be reasonably required by Director of the Board's Bureau of Operating Rights; and

(d) Copies of all arbitrators' decisions and awards issued under this Agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

2. That except to the extent granted herein, all applications, requests and motions involved in this proceeding be and they hereby are denied and the investigation instituted by Order E-26000 be and it hereby is terminated.

INITIAL DECISION OF EXAMINER ARTHUR S. PRESENT, MARCH 7, 1969

Preliminary Statement

For the third time the Mutual Aid Agreement (hereinafter referred to as the "Agreement") is before the Board. The original agreement among air carriers providing for mutual aid in the event of a strike, effective for only one year, was approved by the Board in 1959. *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168, reconsideration denied, 30 C.A.B. 90 (1959). The currently effective Agreement was approved by the Board in 1964 for a period of three years. *Mutual Aid Pact Investigation*, 40 C.A.B. 559. By timely application filed on May 2, 1967, the seven present Carrier Parties[1] to the Agreement

[1] American Airlines, Inc., Braniff Airways, Inc., Eastern Air Lines, Inc., Northwest Airlines, Inc., Pan American World Airways, Inc., Trans World Airlines, Inc., and United Air Lines, Inc.

ask the Board to renew the approval of the Agreement for an indefinite period.

Upon consideration of the application, answers filed by certain employee organizations requesting that the application be denied or, in the alternative, be set down for hearing, and a reply submitted by the Carrier Parties, the Board decided to institute this investigation to determine whether continued approval of the Agreement is not adverse to the public interest and not in violation of the Federal Aviation Act of 1958, as amended, and, if the Agreement should be approved, what terms, conditions, and limitations, if any, should be attached to the approval. Order E-26000, November 17, 1967. The Board's order also assigned the matter for hearing.

After due notice, public hearing was held. Initial and reply briefs have been filed.

The Agreement

The terms of the Agreement are set forth in Appendix A and were described in detail in the Board's prior decision, 40 C.A.B. at 573-577, 599-600. However, for the purposes of this decision, a brief resume may be helpful at this juncture.

The Agreement provides for mutual assistance in the event any party's flight operations should be shut down by a strike which has been called (1) for reasons which include the enforcement of demands in excess of or opposed to the recommendations of a board established by the President of the United States under section 10 of the Railway Labor Act and applicable to such party; or (2) in the absence of the establishment of such a board or in case such a board fails to make specific recommenda-

tions on the merits for the settlement of the issues in dispute and the struck party has in all respects complied with the Railway Labor Act; or (3) before the employees on strike have exhausted the procedures of the Railway Labor Act; or (4) otherwise unlawfully.

If a strike fulfilling the requirements of the Agreement should occur, the parties remaining in operation pay to the strike-bound carrier their increased revenues during the term of, and attributable to, the strike less applicable added direct expenses. Moreover, if these so-called "windfall" payments do not equal 25 percent of the normal air transport operating expenses of the flight operations shut down as a result of the strike, each operating carrier must pay a proportionate share ("supplementary" payment), limited in any one calendar year to an amount equal to one-half of one percent of its air transport operating revenues for the previous calendar year, of the sum needed to furnish the minimum percentage.

Only trunkline carriers are eligible to become parties to the Agreement. Any trunkline carrier which elects to become a party to the Agreement is liable for all payments it would have had to make if it had been a party on and after January 1, 1962, less all amounts which it would have been entitled to receive for such period. In lieu thereof, a carrier which had not been a party to the Agreement prior to January 1, 1962, may choose to become a party by giving six months' notice of its desire to become a party.

A party may withdraw from the Agreement as of December 31 of any year by providing at least 60 days' written notice. In such case, the carrier remains obligated, for a period of 12 months following the month in which the withdrawal became effective, to make the payments re-

quired by the Agreement to the extent it has received, on or after January 1, 1962, supplementary payments in excess of the supplementary payments it has made.

Pertinent Statutory Provisions

The basic statutory provision applicable is section 412 of the Federal Aviation Act of 1958, as amended, which covers certain agreements between air carriers affecting air transportation. Under subsection (b):

> The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; * * *

Section 102 of the Act requires that the Board consider in the public interest, among other things:

> (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> (b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

Furthermore, under section 401(k)(4) of the Act:

It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.

Issues

The issues, as determined at the prehearing conference, are of broad scope. Without attempting to delineate all the subissues, and recognizing that there is some overlap among the issues stated, they are as follows:

Will renewal of the Agreement be adverse to the public interest?

If renewal of the Agreement is approved, what conditions, limitations, or restrictions, if any, should be imposed?

Have the existence of the Agreement and the activities pursuant to it been adverse to the applicable provisions or policies of the Railway Labor Act, as amended?

Will the Agreement result in restraints on competition or other forms of discrimination against air carriers which are not parties to the Agreement?

Will renewal of the Agreement adversely affect labor-management relations in the air transportation industry?

Has the existence of the Agreement prevented or encouraged the institution of industry-wide collective bargaining and, if so, is such a prevention or encouragement adverse to the public interest?

Has the existence of the Agreement resulted in a derogation of the duty to bargain collectively in good faith on the part of management or labor?

Will the renewal of the Agreement have an adverse effect on industrial peace and the public convenience?

Does the Agreement have the effect of directly or indirectly broadening Government participation in collective bargaining and labor-management relations?

Have the carrier parties to the Agreement complied with the reporting and other requirements as prescribed in prior Board orders?

What effect should actions of the Board such as the orders granting exemption authority to nonstruck carriers to provide additional service to points on their own route systems during the 1966 strike by the International Association of Machinists and Aerospace Workers (IAM) have in the instant proceeding?

How should the availability to struck carriers of military contract revenues affect the instant proceeding?

What have been the effects of the broadening of coverage of the Agreement, to include supplemental payments as well as windfall payments, since 1958?

However, as will become apparent from the contentions of the parties, described hereinafter, there is no controversy in regard to some of the issues.

Opinion

Contentions of Parties

Carrier Parties

The Carrier Parties request approval of the Agreement for an indefinite period. They contend that disapproval of the Agreement by the Board would contravene the national labor policy and constitute a gross abuse of the Board's discretion. It is their position that the Agreement represents a positive force in the airline industry by contributing to airline stability. Furthermore, they maintain that the Agreement has not adversely affected the collective bargaining process or labor relations on mutual aid carriers. Finally, the Carrier Parties aver that developments since the last proceeding strengthen the conclusion that the Agreement is consistent with the public interest.

Six Union Parties

The Six Union Parties[2] oppose the application and ask that the Agreement be disapproved as adverse to the public interest. They do not claim that the Agreement violates any specific provision of the Federal Aviation Act or of the Railway Labor Act, although they contend that the Agreement defeats the purposes of the latter statute. The Six Unions maintain that the Board's jurisdiction over the Agreement does not extend to the consideration of general labor policy, and the basic criterion to be applied concerns the impact of the Agreement upon industrial strife in the air transportation industry. Employing that standard, the Six Unions as-

[2] A joint presentation was made by the Air Line Dispatchers Association, the Brotherhood of Railway, Airline and Steamship Clerks, the Communication Workers of America, the Flight Engineers International Association (FEIA), the IAM, and the Transport Workers Union of America.

sert the Agreement has brought increased labor strife and interruptions to interstate air commerce. Moreover, they contend that the Agreement creates a conflict of interest in the conduct of labor-management relations in the air transport industry and that the Agreement is detrimental to the carriers. They urge that for these reasons the Agreement is adverse to the public interest and defeats the purposes of the Railway Labor Act.

Air Line Pilots Association, International

The Air Line Pilots Association, International (ALPA), notes that in the earlier proceedings it participated jointly with other unions and states that it is now appearing separately because of substantial changes in the industry and pilot-carrier labor relationships since the conclusion of the prior hearing and because of the serious impact of possible Board approval. ALPA requests denial of the application in its entirety or at least with respect to ALPA.

ALPA alleges that the Agreement is unnecessary, violates the Railway Labor Act with respect to multi-employer economic activity against employees, is inconsistent with Federal court decisions which limit the economic options available to a carrier during a strike, and is adverse to the public interest because it has not contributed to freedom from industrial strife or fostered sound economic conditions in the air transport industry; rather, it has functioned to disrupt the collective bargaining process and negatively affect pilot-carrier relationships.[3]

[3] By letter of December 26, 1968, ALPA requests the Examiner to strike from the record certain portions of the Carrier Parties' initial brief on the ground that those portions contain references to matters

Opinion

Allied Pilots Association

The Allied Pilots Association (APA) is the exclusive bargaining representative for the pilots in the employ of American Airlines, Inc. APA submits that renewal of the Agreement would be contrary to the public interest and the application should not be approved. APA contends that the Agreement increases the likelihood, and prolongs the duration, of work stoppages in the airline industry. As an alternative, APA urges that the Agreement should not be approved with respect to American or any other carrier which fails to demonstrate that its employees' interests and organizations are so interrelated with those of organized employees on other carriers that the carrier in question must, of necessity, conduct its industrial relations in concert with other carriers.[4]

Bureau of Operating Rights

The Board's Bureau of Operating Rights (Bureau) recommends that the Agreement be approved for a period of five years. It contends that the findings and conclusions

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not included in the record. The Carrier Parties answered by letter dated January 3, 1969, and ALPA replied in a letter dated January 6, 1969.

ALPA's letter of December 26 constitutes, in effect, a motion to strike governed by Rule 18 of the Board's Rules of Practice. As such, it must conform with Rules 3 and 4 of the Board's Rules of Practice. However, it does not comply with the requirements of the Rules, and neither does the answer or reply. In addition, no permission to file a reply was granted pursuant to Rule 18(c). In these circumstances, ALPA's letters and the letter of the Carrier Parties shall be disregarded.

[4] Although APA appeared at the hearing and participated in the cross-examination of Carrier Parties' witnesses, it did not present affirmative evidence and did not submit a brief to the Examiner. The position recited above was taken at the prehearing conference and presumably has not been changed.

made by the Board in the prior proceeding remain valid and the present record does not furnish a satisfactory basis for disapproval. The Bureau also maintains that the factual considerations which moved the Board to approve the Agreement for a temporary period—unresolved overcapacity problems and unsettled crew complement issues—are still applicable. Accordingly, the Bureau believes that the Agreement should be reexamined at some point in the future, and it suggests five years from July 1967 as a time consistent with the Board's prior temporary approval.

Discussion

In setting this matter for hearing, the Board sought the benefit of a record developed through a full evidentiary hearing to resolve the disputed questions of fact and important policy issues involved here. The Board said, "The investigation will furnish a means for a complete reexamination of the issues previously considered by the Board in the light of such new matters as may have developed since 1964." Order E-26000 at 2. Consequently, the focus of inquiry is on whether there is additional evidence or evolution in the law since the last proceeding which, considered alone or together with the record of the prior proceeding, call for a result different from that twice reached by the Board.

The Examiner has carefully considered the evidence and the contentions of the parties and, on the basis thereof, is convinced that the Agreement should be approved without a time limit. Events which have transpired since the last decision have been added to the record. Reference has been made to court decisions since the prior Board approval. Nevertheless, in the main, the essence of the

record and the arguments of the parties are the same as when previously reviewed by the Board. While details as to labor-management relations may differ since the record leading to the 1964 decision was developed, in substance there has been little change. And although some novel arguments have been advanced in the current proceeding, the applicable legal principles remain unaltered. In these circumstances, it serves no useful purpose to deal with all the contentions of the parties; such an approach would entail a detailed repetition of findings and conclusions in the prior Board decisions to an unnecessary extent. Accordingly, the Examiner will confine his discussion to those contentions which because of their importance or uniqueness merit comment.

Issues Not in Controversy

The parties have not adduced any evidence directed at anti-trust considerations. That matter was discussed in the prior decision. 40 C.A.B. at 581-582, and no departure from the findings and conclusions therein is warranted. Nor is there evidence that the Carrier Parties have failed to fulfill the requirements of prior Board orders involving the Agreement.

Role of National Labor Policy

In determining whether or not the Agreement is adverse to the public interest, there is substantial dispute over the place of national labor policy. The Carrier Parties contend that the national labor policy is incorporated into the public interest standard of section 412 of the Federal Aviation Act. They assert that the Board must give great weight to the national labor policy and must accomodate that policy to the considerations contained in section 102

of the Act. It is the position of the Carrier Parties that if the labor policy authorizes mutual employer self-help arrangements, such as that afforded by the Agreement, it would be an abuse of the Board's discretion to disapprove the Agreement in the absence of some unique and compelling air transportation consideration.

The Six Unions contend that the Board's jurisdiction over the Agreement does not extend to consideration of general labor policy. They quote from the Board's initial opinion on mutual aid as follows (29 C.A.B. 173):

> The range of our inquiry, however, is limited to a determination of the effect of the agreement upon these statutory objectives. [Refers to section 102 of the Federal Aviation Act.] Matters of general policy as to labor disputes are not to be considered by the Board in assessing whether the agreement is adverse to the public interest. It is the function of Congress, and not of the Board, to weigh the wisdom of such agreements as a factor in the furtherance of labor policies not directly related to the promotion of a sound air transportation system. [Footnote omitted.]

The Six Unions claim the Board has thereby made clear that the basic criterion to be applied to the Agreement is its impact upon industrial strife in the air transportation industry.

The language quoted by the Six Unions does not mean that the Board can, without adequate justification, override general labor policy in administering the Federal Aviation Act. Thus, before reaching the point in its opinion where the quoted language lies, the Board had directed its attention at whether the Agreement violated the Rail-

way Labor Act, which Act prescribes the national policy for labor-management relations in the air transportation industry. Moreover, section 401(k)(4) of the Federal Aviation Act expressly requires that air carriers holding certificates comply with the Railway Labor Act. Therefore, while it is not generally the role of the Board to regulate airline labor policies or to evaluate the advisability of arrangements in connection therewith,[5] when labor matters come to the fore in relation to the Board's functions under the Federal Aviation Act, the policies of that Act and national labor policies must be accommodated, one to the other. *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156, 172 (1962).

Any doubt in this regard was settled by the Board in the prior proceeding. The Board declared (40 C.A.B. at 609-610):

> Prior to the enactment of the Act, Congress had prescribed the national policy relating to the regulation of labor-management relations in the air transportation industry by the enactment of title II of the Railway Labor Act in 1936. In so doing, it placed the air transportation industry *in genere* with the railroad industry and within the framework of labor legislation which had developed in that industry since 1888. However, by subsequently enacting section 401(k) of the Act, Congress made compliance with the Railway Labor Act a condition for holding a certificate of public convenience and necessity and, as a consequence, made the Board an enforcing agency of the Railway Labor Act insofar

[5] "The Board's experience and expertise is with transportation not labor relations problems." *Oakland* v. *Civil Aeronautics Board*, 284 F. 2d 224, 228 (D.C. Cir. 1960).

as air carriers subject to the Act are concerned. Although Congress in that Act also gave the Board the prerogative to regulate the air transportation industry solely as required by the public interest objectives set out in section 102 of the Act, it did not by this legislation transfer the general regulation of labor-management relations in the industry to the Board. Although the Board is invested with plenary authority within its sphere, its competency is in the field of air transportation and not in the area of labor relations. It follows, therefore, that although not proscribed from regulating labor management relations in the industry, it should exercise extreme circumspection when acting within its sphere of authority over air transportation so as not to affect labor-management relations in a manner contrary to the national labor policy, unless, as in the correlated area of antitrust confliction, it finds its action is required "by a serious transportation need in order to secure important public benefits." In order to refrain from indirectly interfering with the national labor policy affecting air transportation embodied in the Railway Labor Act, it should accommodate its responsibilities under the Act to the provisions of the Railway Labor Act, if it is feasible to do so. [Footnotes omitted.]

This point was emphasized again later (40 C.A.B. at 614-615):

> The Government's traditional passive role in the collective bargaining process is particularly applicable to the Board since, under the Act, its authority over labor management relations in the air transporta-

> tion industry is incomplete, being limited to the regulation of only one party, the carrier. In addition to the statutory limitation of its authority, the Board and the courts have recognized that the competency of the Board lies in air transportation and not in the labor-management relations area. In the opinion of the examiner, a policy decision curtailing the use by air carriers of an economic weapon not invalid under the national labor policy, in the absence of a manifest substantial "need," would be an improvident exercise of discretion. * * * [Footnote omitted.] [6]

Accordingly, the Board must heed the national labor policy, and it must accommodate the objectives of the Federal Aviation Act to the purposes of the national labor policy. The Board cannot properly take action derogating from the national labor policy unless required by a serious transportation need.

Agreement and National Labor Policy

The Carrier Parties declare that the Agreement is sanctioned by national labor policy, which permits the parties to a major labor dispute to resort to self-help in settling their differences once the procedures of the Railway Labor Act have been exhausted. The Carrier Parties urge that the government is forbidden to interfere with the bargaining tactics used by the parties to the collective bargaining process unless such tactics are independently illegal. It is their position that mutual employer financial assistance is within the ambit of permitted activity in labor disputes.

ALPA challenges the position of the Carrier Parties. It contends that the Agreement, as applied to ALPA, is not

[6] See also 40 C.A.B. at 562.

reconcilable with the limitations of national labor policy and the Railway Labor Act on multi-employer economic activity against employees. ALPA also maintains that the Agreement does not constitute proper carrier self-help under the Railway Labor Act because carriers subject to that Act must limit their responses to a strike on an *ad hoc* basis in accordance with the particular situation.

The previous Board decisions did not conclude that the Agreement is inconsistent with national labor policy or the Railway Labor Act. None of ALPA's arguments persuade the Examiner that a different result should obtain now.

In support of the position that the Agreement cannot properly be applied to it, ALPA asserts that (1) multi-employer economic measures against employees are limited to multi-employer bargaining units, and (2) multi-employer economic action to protect multi-employer bargaining units can be invoked only when the multi-employer bargaining units are confronted with activity directed at their common front or integrity, citing *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87 (1957), known as the "Buffalo Linen" case, *Labor Board* v. *Brown*, 380 U.S. 278 (1965), and *New York Mailers' U. Number Six, Inter. Typo. U.* v. *N.L.R.B.*, 327 F. 2d 292 (2nd Cir. 1964). These cases do not sustain ALPA's position.

All of the cases cited by ALPA involved lockouts of their employees by employers joined in multi-employer bargaining associations. In every case, the charge that such self-help violated the National Labor Relations Act was rejected by the Court. Nevertheless, in substance, ALPA argues that because these cases involved multi-employer bargaining associations a different conclusion would prevail with respect to the Agreement inasmuch as the carriers do not bargain collectively with ALPA. The Examiner finds noth-

ing in these cases which supports ALPA's argument. Indeed, the *Buffalo Linen* case was cited by the Board in its 1964 Board opinion in buttressing the conclusion that the Agreement represents legitimate self-help.[7]

In any event, *Kennedy* v. *Long Island Railroad Company*, 211 F. Supp. 478 (S.D. N.Y. 1962), *aff'd.*, 319 F. 2d 366 (2nd Cir. 1963), *cert. denied*, 375 U.S. 830 (1963), disposes of ALPA's position. That case involved a strike insurance plan among railroads quite similar to the Agreement. The Brotherhood of Railroad Trainmen (BRT) had struck the Long Island Railroad Company, and the latter received assistance under the strike insurance plan. Subsequently, BRT and its officers filed a suit for money damages against the Long Island, 22 other railroads, the Association of American Railroads, and a bank alleging that the strike was the proximate result of the strike insurance and that the strike insurance arrangement violated the Railway Labor Act, the Interstate Commerce Act the Sherman Act, and was tortious under New York law. The complaint was dismissed, and the strike insurance plan was held lawful. Thus, this case upheld the legality of multi-employer mutual aid where a single union went on strike against an individual railroad.

ALPA argues that the *Kennedy* case does not incorporate limitations on multi-carrier activity different from the cases previously discussed. To support this position, it quotes the following statement from the court's opinion (211 F. Supp. at 488):

> Multicarrier bargaining of labor demands, referred to as regional and national handling, has been and

[7] 40 C.A.B. at 607, n. 2[a]. Nor is *N.L.R.B.* v. *Milk Drivers & Dairy Emp. Local Union No. 584*, 341 F. 2d 2[a] (2nd Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), also cited by ALPA, apposite.

> is (since the Act) the customary method of collective bargaining.

ALPA also asserts that it does not appear from the court's opinion that any argument was raised to the effect that the railroad insurance plan could not be applied to situations involving single-carrier bargaining.

At the outset, it should be noted that ALPA's entire argument is predicated on a spurious premise. For, as the Examiner has discussed, the cases cited by ALPA do not place limitations on multi-carrier self-help activity.

Moreover, ALPA's contentions do not square with the court's opinion in the *Kennedy* case. The statement quoted by ALPA from the *Kennedy* case was made in the course of a discussion in which the court rebuffed plaintiffs' contention that the strike insurance plan violated the Railway Labor Act by introducing an element of multi-party bargaining without the plaintiffs' consent. The essential point made by the court is that plaintiffs erred in their assumption that the Long Island, by receiving strike benefits to which other railroads had contributed, was being financed to represent an industry-wide point of view and the interests of others instead of only its own interests vis-a-vis plaintiffs. Clearly the situation concerned single-union and single-carrier collective bargaining, and, in that context, the court sustained the program of mutual aid among the carriers.

ALPA further contends that the *Florida East Coast Railway* cases[8] establish that carriers subject to the Rail-

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[8] *Florida E.C. Ry. Co. v. Brotherhood of R. Trainmen*, 336 F. 2d 172 (5th Cir. 1964), *cert. denied*, 379 U.S. 930 (1965); *Florida East Coast Railway Company v. United States*, 348 F. 2d 482 (5th Cir. 1965), *aff'd., sub nom., Railway Clerks v. Florida E.C.R. Co.*, 384 U.S. 238 (1966).

way Labor Act and faced with a strike may not take whatever economic action is thought necessary by management but must limit their response on an *ad hoc* basis in accordance with the particular situation at hand.

These cases in no way detract from the validity of the Agreement in light of national labor policy. They did not involve the question of the nature of the self-help to which a carrier could resort when the processes of the Railway Labor Act had in all respects been exhausted or the strike was illegal. Rather, the cases concerned a situation where the railroad, suffering a lawful strike, unilaterally changed existing collective bargaining agreements without pursuing the steps required by the Railway Labor Act. The courts held that even in these circumstances the railroad could turn to self-help in order to fulfill its obligation to operate, but, with regard to matters still subject to the procedures of the Railway Labor Act, such self-help was restricted to measures reasonably required to conduct operations.[9]

The Examiner concludes that the Agreement is fully consonant with national labor policy. Furthermore, the application to renew the approval of the Agreement must be granted unless such action would conflict with the provisions, or defeat the purposes, of the Federal Aviation Act.

Public Interest Considerations

It is appropriate now to view the Agreement in light of the public interest standard of section 412 of the Federal Aviation Act.

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[9] It was left with the United States District Court Judge to pass on the changes necessary to continue operations. Compare with *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

Stability of Airlines

The promotion, encouragement, and development of air transportation are cardinal objectives of the Federal Aviation Act. The Agreement advances these aims by shoring up airline stability.

In its last opinion, the Board found (40 C.A.B. at 561):

> Air carriers are particularly vulnerable to strikes, and the industry has, in the recent past, been plagued by strikes. The Pact [Agreement] offers, at a not unreasonable cost for the protection obtained, a substantial measure of relief against the costs of strikes, in this fashion and to this extent contributing to industry stability.

Developments since the prior proceeding further support the contribution of the Agreement to airline stability.

There have been two major strikes against parties to the Agreement since the last proceeding. In 1965, ALPA was on strike against Pan American for ten days. In 1966, IAM struck four parties to the Agreement (Eastern, Northwest, TWA, and United) and National Airlines, Inc.,[19] for 43 days.

The loss to Pan American during the period of the ALPA strike amounted to $5,848,000. Mutual aid covered approximately 59 percent of this loss, so that the net strike loss was $2,412,000 before taxes. In addition, as a consequence of the strike, Pan American's post-strike losses, for which no mutual aid is available, constituted an estimated $2 million.

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[19] National became a party to the Agreement on March 11, 1960, but withdrew effective December 31, 1961.

The 1966 IAM strike produced strike-period losses for parties to the Agreement as follows (in millions):

	Eastern	*Northwest*	*TWA*	*United*	*Total*
Loss	$26,079	$17,008	$58,600	$61,131	$162,818
Less: Mutual Aid	7,667	2,492	17,962	17,943	46,064
Net Strike Loss	$18,412	$14,516	$40,638	$43,188	$116,754

The heavy, adverse effect of the strike is evident from the foregoing data.[11] But mutual aid did serve to soften the losses by approximately 28 percent.[12]

The evidence demonstrates that the Carrier Parties currently need financial stability and that such a need will continue into the future. Over the five-year period 1963 through 1967, the rate of return on investment of the Carrier Parties, excluding the tax savings resulting from investment tax credits, ranged from 6.1 percent in 1963 to 11.4 percent in 1965.[13] For 1967, the rate was 7.6 percent. These percentages may be compared with the average of 10.5 percent found by the Board in the *General Passenger-Fare Investigation*, 32 C.A.B. 291, 308-309, 331 (1960), to be a fair and reasonable rate of return, albeit

[11] From the inception of mutual aid to the present, there have been 20 strikes on carriers party to the Agreement which involved the payment of mutual aid. The losses for the periods of the strikes totaled $247 million before mutual aid, mutual aid payments amounted to $82 million, and the net strike losses before income taxes comprised $165 million.

[12] The Carrier Parties did not furnish the savings in income taxes flowing from the losses.

[13] The rate of return for 1966 was 9.8 percent. The Carrier Parties estimated that if the 1966 IAM strike had not occurred the rate of return would have been 12.3 percent. If the investment tax credit were applied, all rates of return would be approximately one percentage point higher.

not a minimum return. Moreover, the long-term debt of the Carrier Parties doubled in the five-year period from 1963 through 1967, reaching $2.7 billion in the latter year, producing larger, fixed interest costs. In addition, projections show capital expenditures of $7.9 billion in the period 1968-1971. It appears, therefore, that the Carrier Parties fully need their existing financial resources and must develop even greater financial resources internally and externally, to meet their future capital and operating requirements. The record, which goes back to 1946, shows no year strike free. This history signifies that steps to bolster the foundation of the airlines' financial capabilities are not unreasonable and are consistent with the public interest.

ALPA avers that there is no evidence that strikes have jeopardized the financial stability of the Carrier Parties. However, the mutual aid received by Eastern as a consequence of the 1962 FEIA strike was essential to maintain an acceptable cash position and avoid default under the working capital requirements of the loan agreements then in effect.

ALPA submits a number of other contentions directed at demonstrating that the Agreement is no longer needed by the Carrier Parties, at least in regard to the pilots. These contentions concern favorable changes for the industry over the decade since 1958, improvements in labor relations, other avenues of support available to the carriers, and the lack of comparability between pilot strike benefits and assistance pursuant to the Agreement.

Regarding favorable changes in the industry, ALPA points out that the airlines have virtually completed upgrading to jet fleets. This does not mean, however, that the airlines will enjoy problem-free days in the future. The

integration of the Boeing 747 and like aircraft, the operation of supersonic aircraft, and the introduction of other aircraft as yet unknown, no doubt will confront the airlines with sizeable problems, both with respect to operations and financially.

ALPA claims the Carrier Parties have improved financially and expect continued growth. Judgments as to airline financial status at any given point of time are not dependable. A fundamental aspect of the airline industry is the cyclical nature of its earnings. *General Passenger-Fare Investigation*, 32 C.A.B. 291, 328 (1960); *General Passenger-Fare Investigation*, 17 C.A.B. 230, 234-235 (1953). Moreover, the Board recently determined that higher fares for the industry are warranted. *Domestic Trunkline Carriers, Proposed Fare Increases*, Order 69-2-98, February 19, 1969. In any event, even if it were to be concluded that the Carrier Parties have improved financially, as already discussed, sustained financial stability of the airlines is vital to continued growth and the Agreement affords some help in maintaining the necessary stability.

ALPA contends that the record does not establish that the Carrier Parties are increasingly or particularly vulnerable to strikes or that any decline in profits is attributable to pilot-carrier labor relations. ALPA points out that in 1965, when Pan American suffered a pilots' strike, the carrier's earnings were higher than in 1964.

Whether or not the Carrier Parties are increasingly or particularly vulnerable to strikes is of no great significance. The fact is that the Carrier Parties are vulnerable to strikes. Thus, there are immediate and direct losses during the period of a strike when revenues are lost while many expenses continue. In addition, anticipated profits are not

realized. Moreover, there are post-strike losses with revenues increasing more slowly than expenses. Furthermore, there is the real danger that traffic which transferred to a competing carrier during the course of a strike will remain with that carrier. The Agreement plays a part in ameliorating such problems. With regard to the 1965 strike against Pan American, manifestly, the carrier's profits in 1965 would have been larger but for the losses suffered by it during the ALPA strike.

Accepting the proposition submitted by ALPA that pilot-management relations in the industry have improved in no way justifies denial of the application. The improvement in labor relations does not preclude pilots from going on strike if they consider such action warranted. Accordingly, it is not inconceivable that at some future time the Carrier Parties may need to resort to the Agreement to secure a measure of relief against a strike by pilots.

ALPA urges that the Carrier Parties do not need the benefits of the Agreement because pilot no-strike agreements covering military flight operations provide additional strength to the carriers and Board exemption orders during major labor disputes maximize windfall benefits to struck carriers.

As the Board made clear in its initial opinion on mutual aid, allegations concerning relative employee-employer bargaining powers must be disregarded "unless the asserted imbalance in labor-management relations poses a threat to the development of a stable and efficient air transportation system." 29 C.A.B. at 173. Certainly, even when considered with the factors noted by ALPA, the Agreement does not cause such an imbalance. Thus, despite the availability of military contract revenues,[11] the issuance of

[11] See Appendix B.

exemptions by the Board broadening the operations permitted non-struck carriers,[15] and mutual aid, in 1966 the Carrier Parties still suffered the large strike losses previously set forth (see p. 19, *supra*.).

The contention that there is a lack of comparability between pilot strike benefits and assistance under the Agreement must also be cast aside for reasons indicated in the preceding paragraph.[16] Moreover, there is no evidence that the pilots have suffered through any disadvantage in bargaining power. Despite the existence and application of the Agreement, pilots' wages have increased substantially and they have gained improved working conditions and enhanced fringe benefits through the collective bargaining process.

Labor Relations

The Six Unions allege that the Agreement has brought increased labor strife and interruptions to interstate air commerce. They contend that since the Agreement has been in effect there has been an average yearly increase of 1.2 strikes, or approximately 35 percent, in the airline industry and the average length of the strikes has risen by approximately 15 percent. Moreover, they assert that in the period from the last Board approval of the Agreement through 1967 there has been a similar increase in the number of

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[15] See, for example, *Emergency Air Transportation Requirements*, Order E-23028, July 9, 1966. The record does not indicate the effect of the exemption orders on the Carrier Parties. Of course, there is no way of foretelling whether any future strike would move the Board to issue similar exemption orders. No such order was issued in connection with the pilots' strike against Pan American in 1965.

[16] In any event, before a meaningful comparison could be made, it would be necessary to introduce into the record evidence (now absent) showing the financial resources of the individual pilots as well as their financial obligations.

strikes and the average length of each strike as compared with the pre-Agreement period. The Six Unions claim that even if strikes growing out of the crew complement issue were eliminated there would be an increase over the pre-Agreement period in the number of strikes and a substantial increase in their average length.

In the last proceeding, the Board rejected this statistical approach of imputing increased labor strife to the Agreement. The Board said (40 C.A.B. at 562-563):

> The unions claim * * *: "Once the record demonstrates that there has been an aggravation of labor disputes and an increase in labor strife within the air transport industry under the Pact, it is submitted that there is a prima facie case that the Pact violates the public interest and that the burden then rests upon the carrier parties to demonstrate that this increase in labor strife cannot be attributed to the Pact."
>
> In our opinion the bare fact that there may have been a deterioration in labor-management relations during the period of operation of the Pact covered by the record does not raise a presumption that the deterioration was caused by the Pact, and such fact, standing alone, does not make out a "prima facie case" that the Pact violates the public interest.

Furthermore, the data persuade the Examiner that the Agreement has not led to increased labor strife. If there is any significance in the data advanced by the Six Unions, it lies in comparing strikes against parties to the Agreement (*i.e.*, an air carrier which was a party to the Agreement at the time it suffered the strike) with strikes against other

air carriers. Such a comparison discloses no important difference in the number of strikes or their duration.

Since the Agreement has been in operation, the number of strikes, the number of days flight operations were halted, and the average number of days flight operations were shut down per strike, have been as follows:

	Parties to Agreement[17]	*Other Air Carriers*[18]	*Total*
Strikes	25	20	45
Days Flight Operations Halted	707	586	1,293
Average Days per Strike	28	29	29

An analysis of strikes since the last decision of the Board approving mutual aid yields the following data:

	Parties to Agreement	*Other Air Carriers*	*Total*
Strikes	6	9	15
Days Flight Operations Halted	183	250	433
Average Days per Strike	31	28	29

Because the 1966 IAM strike possessed singular aspects (discussed *infra*, pp. 34-37), the results of eliminating that strike from consideration are noteworthy. With respect to strikes since the Agreement went into effect, the data are as follows:

	Parties to Agreement	*Other Air Carriers*	*Total*
Strikes	21	19	40
Days Flight Operations Halted	535	543	1,078
Average Days per Strike	25	29	27

[17] See Appendix C.

[18] See Appendix D.

Since the last Board decision on mutual aid the data are:

	Parties to Agreement	*Other Air Carriers*	*Total*
Strikes	2	8	10
Days Flight Operations Halted	11	207	218
Average Days per Strike	6	26	22

In view of the foregoing, extended comment is unnecessary on the Six Unions' claim that eliminating strikes attributable to the crew complement issue would not yield a different result. However, it is noteworthy that in the prior proceeding the Board found that "the controversy between two unions over jurisdictional representation of flight crew members has been the primary cause of labor-management disputes, at least since 1958." 40 C.A.B. at 563.[19]

Moreover, the emphasis placed by the Six Unions on the number and length of strikes ignores the fact that in the period 1958-1968 the Carrier Parties to this proceeding negotiated 221 labor contracts. In addition, in the last six years, Pan American, TWA, and United have reached a total of six agreements providing for arbitration of unresolved issues in major disputes. The large number of negotiated settlements without recourse to strikes is further evidence that the Agreement is not an impediment to labor peace.

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[19] Appendix E contains a list of strikes involving carriers party to the Agreement, indicating those ascribable to the crew complement controversy, as taken from the initial brief of the Six Unions. The Six Unions have not attributed to the crew complement controversy certain strikes which the Board found did stem from that controversy. These are the American and Eastern strikes in 1958 (40 C.A.B. at 620), strikes against Northwest and Pan American in 1960 (*Id.* at 621), and a strike against Pan American in 1962 (*Id.* at 624). Furthermore, National was not a party to the Agreement at the times it suffered strikes in 1964 and 1966.

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The Six Unions also maintain that the Agreement has created mistrust in the minds of employees and serves as an irritant to the employer-employee relationship in the industry. The airline coordinator for IAM testified that union members term the Agreement a "strike breaking" arrangement.[20] ALPA argues that the mere risk that the Agreement will lead to an otherwise unnecessary work stoppage is sufficient to deny renewal.

The Agreement cannot properly be disapproved on the basis of subjective factors such as mistrust in the minds of employees. With regard to ALPA's contention, if there should be an unnecessary work stoppage, the employees would be the ones to embark upon such a maneuver. If substantial weight were given to these contentions, the logical extension would call for stripping the air carriers of all means of self-help. It would be manifestly unfair to confine the resources for self-help available to air carriers when the Board has no jurisdiction over the unions and cannot regulate the weapons of self-help they might use. Moreover, the Board would be unwarranted in taking such a step, *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 490 (1960), unless justified by its duties pursuant to the Federal Aviation Act.

From an objective point of view, the evidence does not show that the Agreement has had any important effect on labor-management relations. Two union representatives testified. The testimony of the IAM witness and other evidence establish that the union makes its proposals on the basis of what it believes its members are entitled to earn and that the Agreement has not deterred the union from battling for and gaining its objectives. The testimony of the

[20] Certain characterizations in the introductory clauses of the Agreement are ill-suited for facilitating labor-management relations.

Opinion

ALPA witness reveals that, despite the existence of the Agreement, the pilots and carrier management have been able to settle their differences in recent years based on mutual trust. Moreover, the witness recognized that most contract negotiations in the industry during the past decade had concluded with agreements reached in the absence of strikes or lockouts and declared that this was "due to a problem solving atmosphere taken by both the management and the unions themselves." (Tr. 431). He anticipates labor peace, as far as the pilots are concerned, for the foreseeable future unless the carriers should attempt to make fundamental changes in existing collective bargaining agreements. In the opinion of this witness, the Agreement had no effect on the resolution of the crew complement issue which plagued the industry in the early days of jet operations. He also indicates that the Agreement has had little impact on the formulation of the issues by the parties to collective bargaining or on the solution of the issues.

From the carriers' standpoint, the evidence also shows that the Agreement does not play a role in the development of carrier bargaining positions or during the negotiating process. It is only at the point a strike appears imminent that the carriers give consideration to the Agreement in deciding whether to suffer the strike.

The evidence establishes, therefore, that the Agreement has had little, if any, impact on labor-management relations.

The Six Unions state that the basic test of the impact of the Agreement upon the public interest is the Agreement's success in avoiding or reducing the number and length of strikes which occur. Similarly, ALPA contends that the record does not indicate that the Agreement has contributed to improvements in labor relations.

However, to gain approval under section 412 of the Federal Aviation Act, the Agreement need not have a favorable bearing on labor relations as long as it does not exacerbate labor relations to the extent of impeding attainment of the objectives of section 102 of the Act. Thus, as pointed out by the Board when it first approved mutual aid, the question is only "whether the agreement threatens, by aggravation of labor disputes, to hinder achievement of the objectives set forth in section 102 of the Federal Aviation Act." 29 C.A.B. at 173. Accordingly, the contentions of the Six Unions and ALPA must be rejected.

Collective Bargaining Process

An integral part of the subject of the preceding section is the question of the effect of the Agreement on the collective bargaining process. Consequently, much of the discussion in the preceding section applies here also. Some additional comment is appropriate, however.

To show the effect of the Agreement on the collective bargaining process, the Six Unions assert that the Agreement was a contributing factor to IAM's position during the 1966 negotiations. In support, they rely on direct testimony of the IAM airline coordinator as follows (Tr. 539-540):

> Q. In your opinion, did the Mutual Aid Pact have any effect upon the IAM position during the negotiations?
>
> A. Well, I think it was one of the contributing factors. I think that due to the reluctance on the part of the carriers to make any type of an offer for such a long extended period of time, and then following an emergency board report which they reluctantly said, "We will agree that," that they did

> not make a proposal that in my opinion they knew they were going to eventually have to make to avoid the strike. It was quite obvious to me that the Mutual Aid assistance that they would receive from non struck carriers played a very prominent part in it.

The testimony does not indicate that IAM changed its bargaining position in any respect because of the Agreement. Rather, the testimony shows that IAM determined to strike against the carriers because the latter failed to submit a proposal satisfactory to IAM.[21]

If there is any doubt on this score, it should be eliminated by the following testimony of the witness on cross-examination by counsel for the Carrier Parties (Tr. 565-566):

> Q. One other question I wanted to ask you: Does the existence of the mutual aid agreement have any effect on the demands served by IAM on airline members to the agreement?
>
> A. On the demands that we are proposing?
>
> Q. Either at this time or any negotiation?
>
> A. No, I don't say they have. We make proposals based upon what we think the members are entitled to. The question as far as mutual aid is concerned is the deterrent that it represents to keep us from getting those things.
>
> Q. Do you figure it is a deterrent to your achieving your demands?
>
> A. Definitely.

[21] The absence of a suitable proposal from the carriers was attributed by the witness to their reliance on the support furnished under the Agreement.

Opinion

ALPA contends that the Agreement functions to disrupt the collective bargaining process. The union claims that the objective of the Agreement is to change the relative positions of the parties in collective bargaining. ALPA concedes that the question of imbalance at the bargaining table is beyond the scope of the proceeding, but it maintains that the Board may consider the principal objective of the Agreement insofar as it negatively affects the collective bargaining process. To support its position, ALPA asserts that the Agreement has the effect of changing carrier bargaining attitudes and positions in the period immediately prior to announced strikes by lowering the cost of suffering a strike, decreasing the sense of urgency to reach agreement, and exaggerating open issues through the increase in carrier economic strength derived from the Agreement. ALPA argues that the objective of changing bargaining relationships through increased carrier economic strength is not based upon any legitimate business end and that the Agreement represents a carrier attempt to secure economic strength and a bargaining advantage without formal amendment of the Railway Labor Act. ALPA urges that the Agreement is unsuitable to relationships which must rely for their success on mutual confidence and respect and that it is a tax on those carriers which maintain a constructive relationship with their employees.

These contentions have been considered by the Board in the past proceedings and discarded. In its original decision on mutual aid, the Board rejected the contention that the Agreement would detract from the carriers' obligation under the Railway Labor Act to bargain in good faith and would interfere with the prompt settlement of disputes.[22]

[22] The opinion of the Court of Appeals in the *Kennedy* case cites the 1959 Board decision as a "recent and authoritative decision" demonstrating that a mutual assistance agreement "quite similar to the strike insurance plan before us" is no impediment to good faith bargaining. 319 F. 2d at 372.

The Board pointed out that the substantial losses even with mutual aid plus possible permanent diversion of traffic to competing carriers were powerful incentives to avoid strikes. 29 C.A.B. at 171. On reconsideration, the Board further underlined the Congressional intent in the Railway Labor Act to permit the parties "to engage in reciprocal tests of economic strength within the framework of collective bargaining." 30 C.A.B. at 92. In the last proceeding it was found (40 C.A.B. at 628):

> There is no substantial evidence in the record that the Pact has had any material effect upon the collective bargaining process in the industry. Nor does the record indicate that the Pact has resulted in actions by the Pact members repugnant to the purposes and spirit of the Railway Labor Act.[76]

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[76]In fact, disregarding negotiations in which the jurisdictional flight crew controversy overrode the economic considerations, the record shows that the carriers have not experienced any difficulty in negotiating contracts with the air transport unions since 1958.

It also said (40 C.A.B. at 631):

> Although the supplemental payments provision, even as its liability is diminished by "windfall" payments, appears to be a costly form of insurance for a prudent management of a carrier with stable labor relations to underwrite, no one carrier is immune from labor difficulties and the exercise of management discretion in this respect is not subject to review in this proceeding. The overall effect of the agreement on the Pact members as a group appears minimal, although the effect on profits or losses of in-

dividual carriers may be severe. As an insurance arrangement it is economical, in that costs of administration are minimal, with no override such as would be payable in the case of commercial insurance, and no interest payable. Moreover, the carriers have not given a "blank check" to a member carrier to obligate them without limitation for strike losses. The limitation of liability in any one calendar year, based upon one-half of 1 percent of the adjusted air transport operating revenues for the prior calendar year, is keyed to a degree to the ability to pay and is not so large as to cause the paying carrier to get into financial difficulty from this expense alone. On the other hand, the agreement is of use only for brush fires and not holocausts since in the case of a single carrier strike involving one of the larger carriers, the maximum liability would be exhausted in 51 to 85 days, but in the event of simultaneous multicarrier strikes, such as the illegal strike of February 1961, the maximum payments would have been exhausted in 4.8 days.

The examiner's scrutiny of the financial provisions of the agreement does not confirm the Bureau's fear that the agreement financially is of such strength as to create an imbalance in bargaining positions adverse to the public interest objectives. The insurance provision is not attractive enough financially to cause the carriers to refrain from negotiating collective bargaining agreements in good faith or to invite unnecessary strikes for the purpose of presenting an industry position. While admittedly costly, the agreement does not impose a financial burden upon an individual carrier member which would affect its capability to fulfill its obligations under

> the Act, nor is the liability of the carriers as a group so great as to interfere with the development of a sound economic air transportation industry. [Footnote omitted.]

ALPA's contentions carry no more weight now than in the past, and the factual allegations are not sustained by the evidence developed at the hearing.

Furthermore, if the occasion should arise when the Carrier Parties employ the Agreement as a shield against good faith bargaining, the unions have recourse.

The Railway Labor Act, section 2, First, provides (45 U.S.C.A. § 152):

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Thus, if the carriers fail to bargain in good faith, they would violate that Act. Upon appropriate application, either the courts or the Board will require the carriers to bargain in good faith. *Ruby* v. *American Airlines, Inc.*, 329 F. 2d 11 (2nd Cir. 1964);[23] *Air Line Pilots* v. *Southern Airways, Enforcement*, 36 C.A.B. 430 (1962).[24]

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[23] Judgment vacated and case remanded to the District Court with direction to dismiss the complaint as moot, *sub nom., O'Connell* v. *Manning*, 381 U.S. 277 (1965).

[24] Petition for review dismissed as moot, *sub nom., Southern Pilots Association* v. *Civil Aeronautics Board*, 323 F. 2d 288 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 954 (1964).

Detriment to Carriers

The Six Unions aver that the Agreement is actually detrimental to the Carrier Parties because the Agreement provided the margin which persuaded the carriers to undergo the 1966 IAM strike and the strike cost the carriers a substantially greater sum than if they had accepted the original union demands.[25] They suggest that there is a substantial question whether the carriers intended to negotiate in good faith, noting that for those difficult negotiations the carriers appointed as a principal spokesman an individual who had no prior experience in labor relations under the Railway Labor Act. They further contend, to support this position, that the carriers did not make a proposal on the economic issues until the very end of the mediation sessions under the auspices of the National Mediation Board (NMB).

Plainly, it is in the interests of the carriers to avoid strikes. Any strike results in economic loss. Nevertheless, occasions arise when a carrier believes it is more in its interest to suffer a strike than to acede to union demands. The Six Unions would have the Board, on a hindsight basis, judge whether the carriers were wise to undergo the 1966 IAM strike.

It is unnecessary to enter into the murky atmosphere surrounding the contentions of the Six Unions, for the record

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[25] This contention takes into account the original union demands and the final settlement terms and also the strike losses suffered by the carriers as estimated in "Study of the Financial Impact on the Airline Industry of the IAM Strike," Civil Aeronautics Board, July 1967. Although there is a dispute between IAM and the Carrier Parties regarding the dollar values of the original union demands and the final settlement terms, the Six Unions have employed the Carrier Parties' estimates. On these bases, the Six Unions claim the carriers would have been better off in the amount of $74.7 million if they had accepted the original union proposal.

simply does not contain reliable and probative evidence to support the claim that the availability of mutual aid was the determinative factor in inducing the carriers to take the 1966 strike.

Significantly, one of the carriers struck was National, a carrier not a party to the Agreement. And IAM's airline coordinator made it clear that National was not a weak factor in the negotiating process.

The fact that the carriers' principal spokesman had no prior experience in labor relations under the Railway Labor Act lends little support to the Six Unions' position. The principal spokesman was not a neophyte in labor negotiations. He had had approximately ten years of experience in such negotiations pursuant to the National Labor Relations Act, and, in addition, the negotiating committee included expert carrier representatives.

Moreover, the carriers did attempt to reach a settlement prior to the strike. They made an offer during the course of mediation. Furthermore, following the failure of mediation efforts, the NMB profferred arbitration. The proposal was accepted by the carriers and refused by IAM. Later the carriers accepted the recommendations of an Emergency Board appointed by the President of the United States pursuant to section 10 of the Railway Labor Act as a basis for settlement, but IAM declined to submit the recommendations to its membership. The recommended settlement would have resulted in an average annual pay increase of 3.6 percent as compared with 3.2 percent in the President's Wage-Price Guidelines.

The real goal of IAM in this controversy appears to have superseded immediate objectives peculiar to the airline industry. Thus, IAM, with a total membership of approximately 1,025,000, only 68,000 of whom are employed in the

air transport industry, strove to demolish the President's Wage-Price Guidelines and succeeded in doing so.

The focus of IAM on the wage-price guidelines is plain from the statements of union leaders. In March 1966, an IAM vice president explained the union's refusal to accept the NMB's offer to arbitrate on the ground that arbitration would be detrimental to IAM members "considering the present atmosphere with so-called guide lines for wage agreements." Carrier Ex. 26, Att. B, p. 1. In a letter transmitting the ultimate contract terms to the membership for their assent, the president of the IAM declared that the agreement "destroys all existing wage and price guidelines now in existence; in fact, it completely shatters them for all unions." Carrier Ex. 26, Att. J, p. 2. Again, the president of IAM, in remarks made on January 23, 1968, before the Western Conference of the Brotherhood of Teamsters, said about the 1966 strike, "As a further result we broke the administration's attempt to limit worker's wages—though not management profits—through the so-called guidelines," and "It resulted in one of the best settlements we ever achieved in this industry—and it buried the Government's guide lines—forever, we trust." Carrier Ex. 26, Att. K, p. 2. Finally, at the opening of the 27th convention of the IAM on September 3, 1968, the president of the organization referred to past problems with Congress and the White House "especially when we broke the wage guide lines in the air transport strike of '66." Carrier Ex. 26, Att. L, p. 3.

In view of IAM's emphasis on destroying the President's Wage-Price Guidelines, it does not seem that the carriers could have avoided the 1966 strike unless they joined with IAM in a challenge to the guidelines.

Government Participation

ALPA submits that the Agreement adversely affects the collective bargaining process by encouraging and involving government participation through the Civil Aeronautics Board. According to ALPA, the Agreement improperly encourages the Carrier Parties to rely on Board action approving the Agreement for added economic strength.

Contentions regarding Board participation in labor disputes were raised in the last proceeding and found lacking in merit. 40 C.A.B. at 584-586. Here, ALPA takes the unusual approach that air carriers are not justified in entering into an arrangement which, because of the provisions of the Federal Aviation Act, requires Board approval and which, if approved, helps sustain the economic viability of the air carriers in the event their employees go on strike under the circumstances triggering the Agreement.

ALPA's position is ill-conceived. An administrative agency cannot deny relief on the ground that the applicant should not have entered into a transaction requiring approval by the agency. If it is undesirable for the Board to accredit the Agreement for the reasons advanced by ALPA, the Board should be relieved of jurisdiction over such agreements and thereby free the agreements from regulation by the Board. Furthermore, it is not inappropriate for air carriers to seek economic strengthening through Board action. The provisions of section 102 of the Federal Aviation Act make it clear that the Board has this very role to perform in its administration of the Act.

Conflict of Interest

Since the air transportation business affects the public interest, the Six Unions consider it essential that the airlines not be placed in a conflict-of-interest situation. The

record indicates that, at the point a Carrier Party is confronted with the likelihood of a strike, the carrier takes into account the assistance it can anticipate pursuant to the Agreement in reaching its decision whether or not to submit to the strike. Apparently it is the Six Unions' position that the Agreement thereby creates a conflict of interest in the conduct of labor-management relations by inserting an incentive derogating from the public interest in the continued operation of airline service through the minimizing of labor strife and strikes. The Six Unions deem it unimportant that the payments under the Agreement constitute only a portion of a struck carrier's losses; they believe the basic consideration is that the public interest in avoiding a strike is determined within a different financial framework under the Agreement than without the Agreement.

These contentions are without merit. If the theory of the Six Unions were given play, any means of self-help employed by air carriers would present a conflict-of-interest problem. But the national labor policy, as exemplified in the Railway Labor Act, does not require air carriers to assent to union demands and avoid interruptions of service. It only requires that the air carriers, and the unions, bargain in good faith and observe the provisions of the Railway Labor Act. If they cannot reach agreement after exhaustion of the procedures of that Act, the carriers and the unions may have recourse to self-help, which includes mutual assistance such as that afforded by the Agreement. *Kennedy* v. *Long Island Railroad, supra.* And where, as the record here establishes, the Agreement does not pose a threat to the development of a stable and efficient air transportation system, but instead enhances the attainment of such a system, the Agreement is not adverse to the public interest.

Railway Labor Act

Multi-Carrier Bargaining

ALPA contends that the Agreement functions to interpose carriers other than the bargaining carrier into a pending dispute and thereby provides a means for the carriers to impose multi-carrier negotiations on the pilots without regard to Railway Labor Act procedures. ALPA maintains it has at all relevant times bargained with the carriers on a single-carrier basis and it cannot be forced to bargain on a multi-carrier basis.

It is true that under the Railway Labor Act joint bargaining cannot be required of either the employees or the employers. But the Agreement does not thrust such bargaining on ALPA. The Board has twice found allegations of compulsory joint bargaining wanting, 29 C.A.B. at 172 and 40 C.A.B. at 601-609, and the same contention was rejected by the court in the *Kennedy case*, 211 F.Supp. at 488.

Nor does the record developed in the instant proceeding support ALPA's contentions. ALPA relies on testimony of its witness that during concurrent negotiations with Eastern and United the pilots found the proposals of the two carriers were identical on some issues. This hardly demonstrates that the Agreement compels multi-carrier bargaining. First, it appears that the issues on which the positions of the carriers coincided were limited in number. Second, there is no showing that the concurrence of position on the part of the airlines was in any way attributable to the Agreement. Third, it is not unreasonable or unlawful for the airlines to take a common position on a common issue. As the Board said when it first approved carrier mutual aid (29 C.A.B. at 172):

> It may well be, of course, that carriers have and under the agreement increasingly will consult with each other concerning labor questions of common concern. Such a practice, however, would not necessarily entail any sacrifice of each carrier's complete and exclusive control over its collective bargaining.

In addition, the testimony of the ALPA witness indicates that the issues were resolved differently on the two airlines. Finally, the IAM, which had a policy of favoring joint bargaining,[26] has receded from that policy and, pursuant to an IAM Air Transport Committee Report passed at the 1968 convention, now negotiates on a separate but coordinated basis. It is evident, therefore, that the Agreement does not compel joint bargaining.

Application of Agreement to Individual Unions

ALPA asks that, in the event the Agreement should otherwise be approved, such approval be made inapplicable to the pilots. APA seeks principally to avoid approval of the Agreement with respect to American.

ALPA's request is bottomed on the fact that pilot collective bargaining is conducted individually with each carrier by a committee of line pilots in the service of the airline involved, with ALPA home office assistance. ALPA contends that inter-union mutual assistance does not exist, that the future ALPA carrier labor relations picture is favorable, that there have been only two ALPA strikes against Carrier Parties since 1958, that the carrier financial resources far exceed those of ALPA, that no strike benefits have been paid by the pilots since 1963, that no benefits are paid for

[26] The 1966 IAM negotiations were handled on a joint bargaining basis at the request of IAM.

the first 30 days of a strike, and that such benefits as are available to striking pilots would not be sufficient to have any influence on collective bargaining.

These contentions do not convince the Examiner that it would be adverse to the public interest or in violation of the Act to allow the Agreement to go into effect with respect to the pilots. The *Kennedy* case, *supra*, establishes that a mutual assistance arrangement among carriers does not violate the Railway Labor Act in a major dispute between an individual union and an individual carrier. Furthermore, as was discussed earlier, it is not properly within the Board's province to deal with the relative bargaining powers of employers and employees unless there were such an imbalance as to threaten the development of a stable and efficient air transportation system. The record does not demonstrate any such imbalance.[27] Accordingly, ALPA's request is denied.

APA's position arises from the fact that it represents pilots only on American. The reasons justifying denial of ALPA's request warrant the same action with respect to APA.

Conditions

Period of Approval

In the last mutual aid proceeding, the Examiner approved the Agreement without a time limit, but the Board restricted the approval to three years. The Board predicated its action on the ground that the years since creation of the

[27] Even if the allegations of ALPA accurately represent the facts, the factors are subject to change regardless of whether the Agreement should be approved. Thus, inter-union assistance could develop, pilots represented by ALPA could increase their resort to strikes in the future, pilot financial resources could grow, and ALPA policies with respect to strike benefits could alter.

Opinion

Agreement had not been typical for the industry, plagued with a capacity problem, or for labor-management relations, preoccupied with the crew complement issue.

The Bureau recommends that approval again be limited to a term of years, claiming that the same factors previously persuading the Board to place a time period on its approval are still outstanding. The Bureau asserts that the overcapacity problem has not been resolved and that the crew complement for the Boeing 737 and aircraft yet to be placed into service has not been settled. The Bureau suggests five years from July 1967 as a period consistent with the Board's prior temporary approval.

ALPA states that the pattern of improved labor relations between the parties can only be negatively affected by providing the carriers with indefinite assurance of the continuity of the Agreement.

The Six Unions, on the other hand, maintain that the Bureau's position avoids the problem. They urge that there will always be unique labor relations in the industry and that, if the impact of the Agreement in aggravating labor relations is sufficient to warrant its periodic reexamination, such reason also supports disapproval of the Agreement.

The Examiner does not believe temporary approval serves a useful purpose at this stage of the Agreement's existence. If throughout ten years of life for the Agreement industry conditions have not been typical and are not presently representative, it is likely that there is no such measure as a normal period for purposes of the Agreement. Moreover, after three proceedings, two of which have involved comprehensive evidentiary public hearings, it does not appear that there are any legal or factual issues of importance remaining for exploration.

Opinion

The basic principles applicable in evaluating the Agreement have been established. Nothing significantly new in the nature of the evidence has been developed over the years; only the details of the bargaining between employees and employers and the context in which strikes were called have differed to some extent. If, as ALPA contends, the crew complement issue has been resolved and pilot-carrier labor peace is the prognosis for the future, there is even less reason to approve the Agreement for a temporary period. In the judgment of the Examiner it would be an undue burden on the parties and inconsistent with the proper dispatch of the Board's business to require the parties to participate in another proceeding at a prescribed time in the future.

Approval for an indefinite period does not mean that the Board would be powerless if circumstances should arise which call for reexamination of the Agreement. Section 412 of the Federal Aviation Act expressly authorizes the Board to disapprove agreements "whether or not previously approved by it" if the Board finds the Agreement to be adverse to the public interest or in violation of the Act. Accordingly, if justified by future events, the Board can take appropriate action.

Other Conditions

The prior approval by the Board was subject to several conditions none of which were in controversy in the instant proceeding. There are no changed circumstances which warrant modifying or omitting the conditions. Indeed, some of the conditions are necessary to aid the Board in keeping reasonable surveillance over the Agreement to ascertain whether action by the Board in regard to the Agreement may be required. Accordingly, all the conditions will be imposed again.

Opinion

Ultimate Findings

On the basis of the foregoing facts and considerations and all of the evidence of record,[25] it is found that the Mutual Aid Agreement is not adverse to the public interest or in violation of the Federal Aviation Act of 1958, as amended, and should be approved, subject to the following conditions:

1. The approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act;

2. The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

3. In accounting for the amounts due to others and the amounts due from others under the Agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the Agreement as may be reasonably required by the Director of the Board's Bureau of Operating Rights; and

4. Copies of all arbitrators' decisions and awards issued under this Agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

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[25] Contentions of the parties not discussed herein have been considered by the Examiner and do not alter the decision.

Appendix A

MUTUAL AID AGREEMENT, AS AMENDED

WITNESSETH:

WHEREAS, the parties are common carriers holding certificates of public convenience and necessity issued by the Civil Aeronautics Board (hereinafter called CAB) providing for the transportation by air of persons, property and mail; and

WHEREAS, the mutual interests of the parties call for the taking of all proper and lawful measures to bring about sound and reasonable economic conditions that will be of benefit to the air transport industry and to the public; and

WHEREAS, the parties and other airlines are facing or faced with the threat of extreme and unreasonable demands made by representatives of certain of the classes and crafts of their employees, as exemplified by the current dispute between certain of the parties and their maintenance and related employees, represented for the purpose of collective bargaining by the International Association of Machinists, AFL/CIO (hereinafter called IAM), a controversy in which IAM has rejected and shown an utter disregard for the recommendations of the Emergency Board 122 appointed by the President of the United States to investigate said dispute and has struck Capital Airlines and threatened to strike other carriers for their insistence upon substantial compliance with the terms of said recommendations, which action of the IAM tends to undermine the influence, position and integrity of such Board and is destructive of the collective bargaining process; and

Opinion

WHEREAS, it is in the public interest and the interest of the parties hereto that the recommendations of such Presidential Emergency Board created under the provisions of the Railway Labor Act be respected by the employers and employees whose dispute was heard by the Board;*

NOW, THEREFORE, the undersigned hereby agree:

1. (A) In the event any party suffers a strike, resulting in the shutdown of its flight operations, (i) which has been called for reasons which include the enforcement of demands in excess of or opposed to the recommendations of a board established by the President of the United States under section 10 of the Railway Labor Act and applicable to such party; or (ii) which has been called in the absence of the establishment of such a board or in case of the failure of such a board to make specific recommendations on the merits for the settlement of the issues in dispute, and the struck party has in all respects acted in compliance with the Railway Labor Act; or (iii) which has been called before the employees on strike shall have exhausted the procedures of the Railway Labor Act; or (iv) which is otherwise unlawful; then, in such event, each party will pay over to the party suffering the strike an amount equal to its increased revenues attributable to the strike during the term thereof, less applicable added direct expenses.

(B) A struck party (subject to the limitations prescribed below) shall be entitled to additional payments if the payments received under (A) are less than twenty-five percent of its normal air transport operating expenses for the flight operations shut down as a result of the strike (the

* This clause and the preceding clauses were in the original agreement dated October 20, 1958, and they have not been altered by subsequent amendments to the agreement.

excluding added direct expenses applicable to increased revenues attributable to a strike as described in (A) above. A month in which a party's normal operations have for any reason been curtailed to an extent that substantially affects its air transport operating expenses shall not be regarded as a month of full operations.

(2) A party's air transport operating revenue shall include all payments such party has received under the Agreement, but shall not include the increased revenues attributable to any strike with respect to which such party shall have made payments under the Agreement.

(E) In the event of a dispute regarding the requirement to make or the right to receive payment, the dispute shall be referred to final and binding arbitration. Unless the parties involved otherwise agree within twenty days after receipt of the notice and demand for arbitration, the arbitrator shall be selected and the arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Judgment upon any award rendered hereunder may be entered in any court having jurisdiction.

2. Any other trunk air carrier holding a certificate of public convenience and necessity issued by the CAB may become a party to the Agreement by signing counterpart copies and forwarding such copies to each of the other parties and to the CAB for filing. Any such carrier which elects to become a party after March 15, 1962, however, shall be liable for all payments it would have had to make if it had been a party on and after January 1, 1962, less all payments

which it would have been entitled to receive with respect to such period, and the payments by other parties under Clause 1(B) above shall be recomputed accordingly; provided, however, that any such carrier that was not a party to this agreement at any time prior to January 1, 1962 may elect to become a party as provided above, or upon giving six months' notice to the other parties to the agreement and the Civil Aeronautics Board of its desire to become a party at the end of said six months, in which event no payments will be due to or from such joining carrier until the end of said six months, and it signs counterpart copies of this agreement for all the parties and files it with the Civil Aeronautics Board.

Other than as set-off against its liability upon becoming a party as stated above, such carrier shall not be entitled to payments which it would have received had it been a party to the Agreement.

3. This Agreement shall become effective immediately, shall be filed with the CAB, and shall continue in effect until December 31, 1962 and thereafter from year to year, but any party may withdraw effective as of December 31, 1962 or December 31 of any year thereafter by giving at least sixty days' written notice to the other parties and the CAB. Upon such withdrawal by any party, any other party may also withdraw effective as of December 31 of the same year by giving at least thirty days' written notice to the other parties and the CAB. A party that withdraws from the Agreement (at a time two or more other carriers continue) shall nevertheless thereafter remain obligated, for a period of twelve months following the month in which such withdrawal becomes effective, to make the payments required by the Agreement to the extent that such withdrawing

party, on or after January 1, 1962, has received the amounts under Clause 1(B) above in excess of payments made by such party under such Clause 1(B).

This amendment shall become effective immediately and shall be filed with the CAB. If this amendment shall be disapproved by the CAB, it shall terminate forthwith to the extent disapproved and payments made hereunder, to the extent that they are affected by the terms of such disapproval, shall become and be treated as obligations owing from the receiving party to the paying party.

Any party may withdraw from the Agreement in the event the CAB disapproves the Agreement in whole or in part, by so notifying each of the other parties and the CAB, within ten days after such disapproval.

Withdrawal under the preceding paragraph shall be subject to the conditions prescribed in the final sentence of Clause 3 of the Agreement.

IN WITNESS WHEREOF, the parties have signed this agreement as of the date first above written.

AMERICAN AIRLINES, INC.
BRANIFF AIRWAYS, INC.
EASTERN AIR LINES, INC.
NORTHWEST AIRLINES, INC.
PAN AMERICAN WORLD AIRWAYS, INC.
TRANS WORLD AIRLINES, INC.
UNITED AIR LINES, INC.

APPENDIX I

(a) Assume maximum amount payable under (B) is $10,000,000 because of limitation contained in paragraph (2).

(b) Assume one struck carrier receives virtually all of standard amount from payments under (A).

(000 omitted)

Carrier	Standard Amount	Payments Under (A)	Additional Payments Under (B)	Total of (A) and (B) Amount	Total of (A) and (B) % of Standard Amount	Additional Payments as Redistributed	Revised Total of (A) and (B) Amount	Revised Total of (A) and (B) % of Standard Amount
A	$ 5,000	$ 4,800	$ 200	$ 5,000	100%	–0–	$ 4,800	96 %
B	6,000	4,000	2,000	6,000	100%	$ 1,368	5,368	89.5%
C	3,000	2,000	1,000	3,000	100%	684	2,684	89.5%
D	10,000	1,000	6,800*	7,800	78%	7,948	8,948	89.5%
Total	$24,000	$11,800	$10,000	$21,800		$10,000	$21,800	

* Maximum amount payable under paragraph (2) is exhausted.

amount produced by such twenty-five percent being hereinafter called the "standard amount"), such additional payments to be determined as follows:

(1) In the event the payments to a struck party under (A) shall be less than the standard amount, the other parties (whether or not they are obligated to make payments under (A)) shall make such additional payments to the struck party as may be necessary to bring the aggregate of the payments under (A) and (B) up to the standard amount, subject to the limitations contained in paragraphs (2) and (3) below.

(2) The additional payments required of each party under paragraph (1) above shall be in the proportion that such party's air transport operating revenue for the calendar year next prior to the year in which the strike occurs bears to the total of such revenue for all paying carriers, but no party shall be obligated to make additional payments with respect to any calendar year which exceed, in the aggregate, one-half of one percent of such party's air transport operating revenue for such prior calendar year.

(3) In any calendar year in which there are two or more struck parties entitled to payments under (B) and the limitation contained in paragraph (2) shall prevent any of such struck parties from receiving the standard amount, the aggregate amount of all additional payments for such year under (B) shall be redistributed between the struck parties on the basis described below. There shall be no redistribution of payments under (A).

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The redistribution of additional payments under (B) shall be with the object that, to the extent possible, no one of the struck parties shall receive from the total of payments under (A) and (B) a lower percentage of the standard amount than is received by any of the other struck parties except when a lower percentage of the standard amount results from the principle that there will be no redistribution of payments under (A).

An example of redistribution of payments under (B) is set forth in Appendix I attached hereto.

(4) The redistribution referred to in paragraph (3) shall be made promptly from time to time whenever it appears that a party which has already received payments under (B) will attain a higher percentage of the standard amount than it will be entitled to thereunder.

(C) All strike payments shall be made monthly within ten days after the close of each calendar month, or at such more frequent intervals as may be agreed to by the parties, upon the basis of preliminary estimates subject to subsequent adjustment.

(D) For the purposes of the Agreement:

(1) A struck party's normal air transport operating expenses for each day for any operation shall be its average daily air transport operating expenses for such operation includable in Accounts 5100-7000 under the CAB's Uniform System of Accounts and Reports for twelve months of full operations immediately preceding the month in which the strike shall have started,

Appendix E

SIX UNIONS' LIST OF STRIKES INVOLVING PARTIES TO THE MUTUAL AID AGREEMENT

Carrier	Year	Number of Days on Strike
TWA	1958	16
Eastern	1958	38
Eastern	1958	22
American	1958	22
Continental	1960	105*
Eastern	1960	11
Braniff	1960	10
Pan American	1960	1
Northwest	1960	137
American	1961	7*
TWA	1961	7*
Eastern	1961	7*
National	1961	7*
Pan American	1961	7*
National	1961	6
Eastern	1962	82*
Pan American	1962	1
United	1963	1
National	1964	1
Pan American	1964	1
Pan American	1965	10
Eastern	1966	43
National	1966	43
Northwest	1966	43
TWA	1966	43
United	1966	43

* Attributed by the Six Unions to crew complement controversy. See comments, Initial Decision, p. 26, n. 19.
Source: Initial Brief of the Six Unions, pp. 18-19.

APPENDIX C

Airlines Mutual Aid Pact-Order Granting in Part Petition for Reconsideration and Remanding for Further Hearing

Order 70-11-110 (November 23, 1970)

Opinion

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C. on
the 23rd day of November, 1970

Docket 9977
(70-11-110)
Agreement CAB 21445

AIRLINES MUTUAL AID PACT

ORDER GRANTING IN PART PETITION FOR RECONSIDERATION AND REMANDING FOR FURTHER HEARING

In Order 70-7-114 dated July 23, 1970, the Board approved the Mutual Aid Agreement in the form considered by the examiner. In addition, it approved an amended agreement which was entered into on October 31, 1969, subsequent to the issuance of the initial decision, and filed with the Board on February 5, 1970.

The Six Union Parties[1] have filed a petition for reconsideration and the Carrier Parties[2] have filed an answer.

The Six Union Parties request the Board to reconsider Order 70-7-114 and upon such reconsideration to (1) re-

[1] The Air Line Dispatchers Association, the Brotherhood of Railway and Steamship Clerks, the Communication Workers of America, the Flight Engineers International Association of Machinists and Aerospace Workers, and the Transport Workers Union of America.

[2] The original seven carrier parties to the proceeding are American Airlines, Braniff Airways, Eastern Air Lines, Northwest Airlines, Pan American World Airways, Trans World Airlines, and United Air Lines. Pursuant to amendments to the Agreement adopted as of October 31, 1969, Continental Air Lines, National Airlines, and Western Air Lines have joined.

open the proceeding to take evidence on the amended agreement or (2) disapprove the amended agreement. *Inter alia*, they assert that the substantial amendments made to the agreement[3] following the close of the evidentiary hearing and the coincidence of two subsequent labor disputes involving National and Northwest raise serious problems with respect to the relationship between the amended agreement and its impact upon the stability of labor relations in the air transport industry.

The Carrier Parties contend, *inter alia*, that the Board is not required to hold a hearing in light of the extensive evidentiary proceedings in the past on this type of agreement, that the recent amendments do not alter the agreement in material respects, and that no facts are alleged to show that the existence of the amended agreement resulted in consequences contrary to the public interest in connection with the aforementioned two strikes.

We are not presently persuaded that our earlier determination was in error. However, in fairness to the parties and to ourselves, we believe that we should reserve making a final judgment in this important matter until we have before us a fully developed record on the current facts, with all parties afforded an opportunity to present their evidence and arguments and to be fairly judged on that evidence and these arguments. See, *e.g.*, *Retail Stores Employees Union*,

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[3] The amendments increased the level of supplemental payments (over and above the "windfall" payments) from 25 percent of normal operating expenses for operations shut down by a strike to 50 percent of such carrier's expense during the first two weeks of the strike, 45 percent for the third week, 40 percent for the fourth week, and 35 percent for any period thereafter. The amended agreement also increased the annual maximum liability of any carrier for supplemental payments from one-half to one percent of its air transport operating revenue for the previous calendar year. In addition, the new agreement eased the conditions of entry to permit any trunk carrier to join the agreement by November 15, 1969, without a waiting period or back payment.

Appendix B

CARRIER PARTIES

1966 TOTAL AND MILITARY CONTRACT REVENUES

(000)

Carrier	Total	Military Contract	Pctge.
American	$ 727,712	$ 1,833	.3
Braniff	187,827	14,093	7.5
Eastern	500,989	—*	—
Northwest	311,319	37,259	12.0
Pan American	840,967	79,959	7.5
TWA	681,632	20,911	3.1
United	856,903	12,653	1.5
Total	$4,107,349	$166,708	4.1

* In 1967, Eastern had $7,044,000 in military contract revenues.

Source: Total Revenues, Six Unions Joint Rebuttal Exhibit No. 12; Military Contract Revenues, ALPA Exhibit 11.

Appendix C

STRIKES AGAINST PARTIES TO AGREEMENT

Carrier	Period	Flight Operations Halted (Days)
Capital	10-17 to 11-22-58	37
TWA	11-21 to 12- 7-58	16
Eastern	11-24-58 to 1- 1-59*	38
Eastern	11-24 to 12-15-58**	22
American	12-20-58 to 1-10-59	22
Continental	6-29 to 10-10-60	105
Eastern	6-11 to 6-22-60	11
Braniff	9-25 to 10- 5-60	10
Pan American	10- 1 to 10- 2-60	1
Northwest	10-11-60 to 2-24-61	137
American	2-18 to 2-24-61	7
TWA	2-18 to 2-24-61	7
Eastern	2-18 to 2-24-61	7
National	2-18 to 2-24-61	7
Pan American	2-18 to 2-24-67	7
National	5- 2 to 5- 7-61	6
Eastern	6-23 to 9-13-62	82
Pan American	6-23 to 6-24-62	1
United	8-20 to 8-21-63	1
Pan American	8-25 to 8-26-64	1
Pan American	3-31 to 4-10-65	10
Eastern	7- 8 to 8-19-66	43
Northwest	7- 8 to 8-19-66	43
TWA	7- 8 to 8-19-66	43
United	7- 8 to 8-19-66	43
		707

* FEIA.
** IAM.
Source: Carrier Exhibit No. 20.

Appendix D

STRIKES AGAINST CARRIERS NOT PARTY TO AGREEMENT SINCE INCEPTION OF AGREEMENT

Carrier	Period	Flight Operations Halted (Days)
West Coast	11-21 to 11-23-58	3
Lake Central	11-23 to 12- 5-58	13
Pacific	6- 5 to 6- 8-59	3
Southern	8- 1-59 to 6-30-61	65*
Flying Tiger	1-31 to 2-16-60	27
Mohawk	3-17 to 4- 3-60	18
Southern	6- 5-60 to 9- -62	117**
Flying Tiger	2-18 to 2-24-61	7
Western	2-18 to 5-11-61	82
Pacific	4-23-62	***
National	2-15 to 2-16-64	1
BOAC	11-27-64 to 1- 7-65	42
Trans Caribbean	12- 9 to 12-11-64	3
San Francisco & Oakland Helicopter	4- 3 to 4-11-66	8
National	7- 8 to 8-19-66	43
Pacific	11- 6 to 11-13-66	8
Mohawk	12- 9-66 to 1-30-67	54
West Coast	7- 3 to 7-10-67	8
Airlift	3- 1 to 3-24-67	24
Qantas	12- 8-67 to 2-18-68	60
		586

* Full operations resumed 10-5-59.

** Full operations resumed 9-30-60.

*** Four hours.

Source: Carrier Exhibit No. 20.

Opinion

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket 9977
(73-2-110)

AIRLINES MUTUAL AID AGREEMENT

Agreement CAB 21445, as amended

Decided: February 27, 1973

The Mutual Aid Agreement, as amended, is found not to be adverse to the public interest or in violation of the Act, and is approved, for a period of five years, subject to conditions.

APPEARANCES:

CHARLES MILLER, RUSSELL CARPENTER and ROBERT SAYLER for American Airlines, Inc.; Braniff Airways, Inc.; Continental Air Lines, Inc.; Eastern Air Lines, Inc.; National Airlines, Inc.; Northwest Airlines, Inc.; Pan American World Airways, Inc.; Trans World Airlines, Inc.; United Air Lines, Inc.; and Western Air Lines, Inc.

RAYMOND J. RASENBERGER and WARREN C. NIGHSWANDER for Hughes Air Corp. d/b/a Air West; Frontier Airlines, Inc.; Mohawk Airlines, Inc.; North Central Airlines, Inc.; Ozark Air Lines, Inc.; Piedmont Aviation, Inc.; and Texas International Airlines, Inc.

JAMES L. HIGHSAW, JR. and WILLIAM G. MAHONEY for Air Line Dispatchers Association; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes; Communication Workers

America; Flight Engineers International Association; International Association of Machinists and Aerospace Workers; and Transport Workers Union of America.

ROBERT S. SAVELSON for Air Line Pilots Association, International.

MARTIN SEHAM and FRED C. KLEIN for the Aircraft Mechanics Fraternal Association, Locals 24 and 32, and the Allied Pilots Association.

WILLIAM A. KUTZKE for the Department of Transportation.

NATHANIEL B. BREED, JR., and ALEXANDER N. ARGERAKIS for the Bureau of Operating Rights, Civil Aeronautics Board.

Opinion

BY THE BOARD:

In this proceeding we are once again considering the Airlines Mutual Aid Agreement, and particularly certain amendments, effective October 1969 and January 1971, which provide respectively for increased guaranteed payments to struck carriers and participation of the local service carriers.

The Mutual Aid Agreement was first instituted by six trunkline carriers in October 1958, and was approved by the Board for a one-year period.[1] It provided solely for so-called "windfall" payments by participating carriers to a carrier suffering a strike. Payments were authorized only for strikes in support of union demands in excess of the recommendations of a Presidential Emergency Board ap-

[1] Six-Carrier Mutual Aid Pact, 29 CAB 168 (1959).

pointed under the Railway Labor Act, which were called before union exhaustion of the Railway Labor Act prestrike procedures, or which were otherwise unlawful. The "windfall" payments constituted payments equivalent to the increased revenues of non-struck carrier parties that were attributable to the strike, less any added direct expenses. The Board found that although the Agreement would increase management's abilities to withstand the economic impact of a strike, there was no basis for any inference that the agreement would constitute an impediment to *bona fide* collective bargaining, or would interfere with the prompt settlement of disputes.

In 1962 the trunkline carriers (now eight), amended their agreement to provide for a guaranteed minimum payment to a struck carrier in the form of "supplemental" payments which, together with the windfall payments, would provide the struck carrier with a recovery equivalent to 25% of its normal operating expenses. The maximum contribution to "supplemental" payments by any participating carrier was limited to ½ of 1% of the carrier's operating revenues for the prior calendar year. In addition, the coverage of the Agreement was extended to strikes called in the absence of appointment of a Presidential Emergency Board, or where the Report of the Emergency Board failed to make recommendations on the merits of the dispute, provided the struck carrier had in all respects acted in compliance with the Railway Labor Act. In approving the amended Agreement in 1964,[2] following an evidentiary hearing, the Board found that the Agreement offered, at a not unreasonable cost for the protection obtained, a substantial measure of relief against the costs of strikes, and thereby contributed to industry stability in an industry particularly vulnerable to, and plagued by, strikes.

[2] Mutual Aid Pact Investigation, 40 CAB 559 (1964).

Opinion

The present proceedings initially sought approval of the renewal of the 1962 Agreement, as approved by the Board in 1964. However, in October 1969, following hearing and the Administrative Law Judge's approval of the renewal, the trunkline carriers amended their agreement in two major respects, as follows:

> 1. The level of "supplemental" payments to a struck carrier was increased from 25% to a 35-50% sliding scale (50% for the first two weeks, then decreasing 5% weekly to 35% in the fifth week) of the struck carrier's "normal air transport operating expenses."
> 2. The maximum annual obligation of a participating carrier to contribute to supplemental payments to a struck carrier was increased from ½ to 1% of the paying carrier's air transport operating revenues in the preceding calendar year.[3]

By Order 70-7-114, July 23, 1970, the Board, without further evidentiary proceedings, approved the Mutual Aid Agreement as it had been amended by the October 1969 amendments. The Board agreed with the Administrative Law Judge that the Agreement was fully consistent with national labor policy; that the developments since the prior proceeding further supported the contribution of the Agree-

[3] Other amendments, which are not disputed by the parties, provide for modified entry requirements which permitted new parties, or trunkline carriers previously parties to the Agreement, to become parties by November 15, 1969, without any requirements for back payments or a waiting period (as a consequence of this amendment, Continental and National rejoined the Agreement effective November 15, 1969, and Western became a party as of October 3, 1970); stricter withdrawal procedures requiring that the parties give a one year's written notice of intent to withdraw from the Agreement; and revision of the arbitration procedures to cover disputes involving amounts due or owing under the Agreement.

et al. v. *F.C.C.*, U.S. App. D.C. , F. 2d , (No. 22,605, October 27, 1970) (Slip opinion at 11). Accordingly, we will remand the matter for the taking of further evidence with respect to the amended agreement on events which occurred since the close of the earlier hearing.[4]

ACCORDINGLY, IT IS ORDERED THAT:

1. Order 70-7-114 dated July 23, 1970, is vacated to the extent that it approved the amended agreement.

2. This proceeding be and it hereby is remanded to the examiner for further evidentiary hearing in accordance with the views expressed herein.

3. Except to the extent granted herein, the petition for reconsideration of the Six Union Parties is hereby denied.

By the Civil Aeronautics Board:

HARRY J. ZINK
Secretary

(SEAL)

[4] *Inter alia*, the Board desires evidence as to the agreement's role, if any, in affecting the bargaining balance between labor and management in the air transportation industry. In addition, in the event that we reach a different ultimate conclusion on the merits of the amended agreement, we will nevertheless give consideration to whether our action should be prospective only.

Opinion

MEMBERS MINETTI AND MURPHY CONCURRING:

We concur in the remand for the reasons set forth in our dissent to Order 70-7-114 as well as the additional matters subsequently raised by the petitioners.

Vice Chairman Gillilland Filed the Attached Concurrence.

GILLILLAND, VICE CHAIRMAN, CONCURRING:

As pertaining to the reasons stated by the Board for its decision, which, in a sense became the law of the case, the Union Parties have, I believe, the better of it on their requests for remand. Accordingly, I vote to remand.

However, there is another and to me more persuasive reason for not overturning the agreement than those stated. It appears to be clearly established that strike insurance is not *per se* unlawful. Furthermore, it is readily acknowledged that if the insurers were other than air carriers the Board would have no jurisdiction. It follows that if the carriers had chosen to make similar agreements with U. S. Steel or the Great Atlantic and Pacific Tea Company the matter would be beyond the reach of the Board. Consequently it seems to me that the mere fact the carriers have found that they can make a better contract by insuring each other, and have chosen to do so, is no more than a circumstance not justifying the Board's intrusion.

Although I am aware of the precedents and have participated in some of the earlier cases, I am inclined to regard this as one of the Board's gratuitous time consuming involvements, tending to confuse but not dispose, and from which, for the good of everybody, it should be drawing away.

APPENDIX D

Airlines Mutual Aid Agreement

Order 73-2-110 (February 27, 1973)

Opinion of the Board

Opinion of Members Minetti and Murphy, Concurring and Dissenting

Initial Decision of Examiner Arthur S. Present (1972)

oral argument heard. Accordingly, the case is ready for decision.

Upon consideration of the record and the contentions of the parties, we find that we must confirm our original view, expressed in Order 70-7-114, that the various amendments do not so change the basic nature of the Agreement as to make the amended Agreement, unlike its predecessor, adverse to the public interest. We find no evidence of record to persuade us that our original reasons are invalid. Thus we cannot agree with the conclusion of the Administrative Law Judge that the respective amendments should be disapproved. We have also concluded that, subject to a condition which will insure that mutual aid payments will not increase subsidy, local service carriers should be permitted to participate in the Agreement. Accordingly, we find that the Agreement as amended by the amendments of October, 1969 and December, 1970 should be approved, subject to conditions. We will, nevertheless, limit our approval to a period of five years.

Judge Present found that the Mutual Aid Agreement, in the absence of the increases in the supplemental payments effectuated by the 1969 amendments, and without participation by the local service carriers, would not be adverse to the public interest or in violation of the Act, and should be approved. He further found that the record "does not establish that any carrier has incurred or prolonged a strike because of the increased level of mutual aid. Nor does it demonstrate that the viability of any carrier has been critically threatened because of the higher level of contributions required under the amended Agreement." [6] Thus, Judge Present found no direct showing on the reopened record that the amended Agreement, limited as indicated,

[6] I.D. 25, 31-32, 41.

has operated in a manner inconsistent with the public interest, and we agree. We therefore adopt as our own the findings and conclusions of Judge Present in his Initial Decision, attached hereto as an Appendix, except as modified by, or inconsistent with, the views expressed herein.

I.

The Administrative Law Judge found that there were many significant pressures upon a carrier to settle a strike and hence there was no likelihood that a carrier receiving mutual aid payments would prolong a strike indefinitely. However, he saw a potential danger that the 1969 amendments which increased the supplemental payments might encourage a carrier party to the Agreement, particularly a weak airline, to prolong a strike for the short-term benefits of the increased payments. Thus, the increases, in his view, would be adverse to the public interest.

Although, as Judge Present noted, the record fails to demonstrate that the increased payments have in fact had any significant effect on labor-management negotiations, it must be recognized that the increases in supplemental payments were specifically intended to enhance airline management's ability to resist the economic pressures of a strike. It would be naive to assume that management, in its negotiations with labor, would totally ignore the financial cushion that the increased level of mutual aid payments provide.

However, in our view, the appropriate question is not whether a strike might be terminated in some cases more rapidly if increased mutual aid payments were not available. Rather, it is whether the mutual aid payments so shift the bargaining balance in favor of carriers as to create a serious likelihood that a carrier might resist settlement of

a strike on a reasonable basis in circumstances where such a settlement was possible. We are unable to conclude that the Mutual Aid Agreement, either in its original form, or as amended to provide for the increased level of supplemental payments, has altered the negotiating balance between airline management and airline employees in any manner which would be inconsistent with the public interest. Nor can we conclude that the mutual aid payments, of themselves, could become a significant factor in prolonging a strike that otherwise was capable of settlement on a reasonable basis.

The evidence is persuasive that the amended Mutual Aid Agreement has not resulted in any unwarranted shift in the negotiating balance in favor of airline management. In the first place, the expert testimony of record demonstrates,[7] and we agree, that the nature of the air transport product is such that the position of management in labor negotiations in the air carrier industry is somewhat weaker than managements in other types of industries, by reason of the greater impact of a strike on air carriers. The air transport industry, as a service industry, differs from industries such as manufacturing in that the commodity it sells is perishable. Air transport service cannot be stored, like manufactured goods, in contemplation of a strike. Once the plane door closes on empty available seats, that commodity is lost. The air transportation industry, even more than other transportation industries, is subject to this phenomenon because of its heavy dependence upon passenger transport, which is almost totally incapable of stockpiling.

In addition, the evidence with respect to wage settlements in the airline industry demonstrates that the employees retain substantial and effective bargaining power regardless

[7] TCE 80, pp. 11-12.

of the Mutual Aid Agreement. Thus, the record shows that air carrier wages, both average for all employees, and average for ground (rank and file) employees, are higher than, and increases have increased faster than, wages in other industries, including other transportation industries.[8] For the period 1967-1970, airline employment costs increased by some 33%, while the consumer price index increased only some 17%.[9] Furthermore, although in the 1960's increased airline employment costs were more than offset by increases in airline employee productivity, commencing in 1968, wage increases have outstripped increases in employee productivity by a substantial margin. For example, in 1970 employment costs increased some 13.3%, while employee productivity increased only some 2.3%.[10]

Indeed, this 13.3% increase in employment costs in 1970 (during which the increased level of mutual aid payments was first in effect) surpassed the 8.3%, 6.8%, and 9.1% increases in the prior three years 1967, 1968, and 1969, respectively. These facts do not show that the increased level of payments deprived employees of effective bargaining power.

We recognize that the increased payments are specifically designed to, and indeed may well increase a carrier's willingness or ability to resist union demands which the carrier considers to be unreasonable. However, it does not follow that the Agreement thereby becomes adverse to the public interest. The pressures upon a carrier to settle a strike, despite the increased mutual aid payments, are so great that we perceive little danger that a carrier could be significantly influenced, by reason of such payments alone,

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[8] TCE 41, 41a, 42.

[9] TCE 41a, 44, 45.

[10] TCE 46, 47 (p. 4).

ment to airline stability; that the evidence established that the Agreement had had little, if any, impact upon labor management relations; and that the evidence did not show that the Pact had had any material effect upon the collective bargaining process. Specifically with respect to the October, 1969 amendments, the Board concluded that, "while the recent amendments strengthen the Agreement, they do not change its basic nature or add any new element which suggests that it, unlike its predecessor, is adverse to the public interest." The Board noted that it was unable to conclude that the agreement, as amended, would induce strikes or exacerbate labor-management relations, or create an imbalance in the collective bargaining process so as to pose a threat to the attainment of the public interest objectives of the Act. The amended Agreement, the Board found, was consistent with national labor policy and violates neither the Federal Aviation Act nor the Railway Labor Act. The favorable aspects of the Agreement in making a specific contribution to airline stability under conditions of increased cost pressures and declining earnings and profit margins, and in providing at a not unreasonable cost a substantial measure of relief against the costs of strikes, would override any detriments that might arise from the greater recoupment by the airlines of strike losses. The Board recognized that the amendments would provide substantially greater recoupment of strike losses, particularly in the case of short strikes when maximum benefits were provided. However, in this connection the Board stated:

> "It hardly seems reasonable to believe that a carrier will risk a strike on speculation that the strike will be short and that the carrier will realize the maximum benefits. Carriers must, under the new Agreement, as under the old, face the prospect that in all

> probability mutual aid will not meet their strike losses. Finally, the possibility of permanent diversion of traffic to competing carriers will serve as a positive incentive for carriers to avoid strikes."

On reconsideration, the Board, by Order 70-11-110, November 23, 1970, vacated its prior Order to the extent it approved the amended Agreement, and remanded the proceeding for the taking of further evidence with respect to the amended Agreement on events which had occurred since the close of the earlier hearing. These events included not only the amendments, but also the impact of two subsequent labor disputes. In reaching this determination, the Board stated:

> "We are not presently persuaded that our earlier determination was in error. However, in fairness to the parties and to ourselves, we believe that we should reserve making a final judgment in this important matter until we have before us a fully developed record on the current facts, with all parties afforded an opportunity to present their evidence and arguments and to be fairly judged on that evidence and those arguments."

Following the Board's remand, the carriers, on December 10, 1970 adopted an additional amendment, effective January 1, 1971, to permit entry and participation in the Agreement by local service carriers.[4]

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[4] In Order 70-7-114, the Board rejected the requests of Mohawk and North Central to withhold approval of the Mutual Aid Agreement until provision was made for participation of the local service carriers. The Board noted, nevertheless, that such participation was a matter which might well be considered by the two segments of the industry, and its decision denying this request was without prejudice to any future agreement of such a nature which might be filed.

Opinion

In his Initial Decision in the remanded proceeding, Administrative Law Judge Arthur S. Present concluded that the principal 1969 amendments to the Mutual Aid Agreement, providing for an increase in the supplemental payments from 25% to 35-50%, and an increase in the maximum of supplemental payment contributions from ½% to 1% of the participating carriers' air transport operating revenues in the preceding calendar year, should be disapproved. In addition, he concluded that the December 1970 amendment providing for participation of the local service carriers should likewise be disapproved. The disapprovals were, nevertheless, to run prospectively only. On the other hand, Judge Present found that the Agreement, in the absence of applicability of the disapproved amendments, would not be adverse to the public interest or in violation of the Federal Aviation Act, and should be approved for an indefinite period, subject to conditions.

By Order 72-4-59, the Board exercised discretionary review. Exceptions to the Administrative Law Judge's disapproval of the amendments to the Agreement were filed by the trunkline carrier parties to the Agreement, the local service carrier parties, and the Bureau of Operating Rights. (The Bureau also proposes that approval should be limited to five years.) ALPA and Six Union Parties (jointly) (ALDA, BRAC, FEIA, IAMAW, TWU and CWA) filed exceptions to Judge Present's decision insofar as he approved the Mutual Aid Agreement. Briefs have been filed[5] and

[5] Briefs to the Board were filed by the trunkline carriers, the local service carriers, ALPA, the Six Union Parties, and the Bureau. ALPA and Airline Mechanics Fraternal Association adopted their joint brief to the Administrative Law Judge as their brief to the Board. Allegheny Airlines filed a statement of position stating its belief that membership in the Agreement should be open to all certificated carriers, and that its decision not to join should not be construed as opposition.

54% of its total strike losses. Similarly, the $2.5 million mutual aid payments represented only 33.4% of TWA's total strike-cause losses ($7.3 million, including $5.7 million post-strike losses).[13] Hence, in our judgment, the so-called short-term "benefits" of mutual aid fall far short of real profits. Losses from strikes despite mutual aid payments remain substantial and continue to exert tremendous economic pressure on the carrier's side of the bargaining table.

The union parties argue that there is a cause and effect relationship between the increased supplemental payments and the length of the National, Northwest and Mohawk strikes, during which carrier managements received the amended higher level of supplemental payments. However, the record reveals no such relationship. In the National strike the carrier accepted the National Mediation Board proffer of arbitration prior to commencement of the strike, but such proffer of arbitration was rejected by the union (TCE-22, pp. 1-2, Attachments 1, 2). In the Northwest

[13] TCE-53. The initial decision (p. 17) and ALPA's brief (p. 22) make reference to an alleged 29.2% level of normal operating expenses during the course of a strike shutdown. This figure is apparently taken from Jt. Exh. 191, p. 2, in the original renewal proceeding, wherein Northwest projected expenses for a complete shutdown based on its expense reduction in a partial shutdown of ⅓ of its operations (Jt. Exh. 153). The projection was stated to be based on certain assumptions, and excluded the higher proportional expenses in the first weeks of a strike. A more accurate picture would appear to be based on the carriers' exhibits reflecting actual expenses incurred during six strikes where there were total strike shutdowns (Jt. Exhs. 152, 154). The level of expenses during these six strikes ranged from 23% to 56% of normal operating expenses, with an average for the total of the six of approximately 36%. These exhibits also reflect the higher level of expenses for strikes of shorter duration. While the declining 50% to 35% scale of guaranteed mutual aid payments would appear to be slightly in excess of the level of operating expenses during a total shutdown reflected by these 1958-1961 figures, the excess would appear to be substantially less than the inevitable post-strike losses, and hence does not appear to be unreasonable.

strike the union rejected arbitration while the company had the arbitration proffer under consideration (TCE-23, p. 3, Attachment 4). In the Mohawk strike the carrier accepted arbitration as to most of the issues. The union initially rejected the proposed arbitration, although it later consented to arbitration provided that all issues were submitted. Prior to the strike, the Mediator noted that the union's unwillingness to concentrate on reaching accord on the principal economic matters before trying to conclude agreement as to unresolved working conditions constituted an impediment in the mediation proceedings (Exh. MO-201, p. 2, 37; MO-C, p. 3).

The unions also vigorously argue that the Agreement creates an incentive for a member carrier to refuse to bargain in good faith as required pursuant to the Railway Labor Act, relying instead on the Mutual Aid Agreement payments to support it during the course of the strike. We find no merit in this argument.[14] We have already discussed the serious impact of a strike upon a carrier, despite the Mutual Aid payments. Moreover, there is no evidence in the record which would support the unions' contention. Rather, the record is replete with evidence of the earnest and consistent good faith efforts of National, Northwest and

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[14] Nor can we find any merit to the contention that the Agreement is adverse to the public interest by reason of any tendency to establish industry-wide bargaining. The terms of the agreement are unrelated to the nature of the bargaining unit, and despite effectiveness of the Agreement since 1958, there has been no transition to industry-wide bargaining. Similar contentions have previously been rejected. Six Carrier Mutual Aid Pact, 29 CAB 168, 172 (1959); Mutual Aid Pact Investigation, 40 CAB 559, 604-606, 631 (1964). *Cf.*, Kennedy v. Long Island Railroad Company, 211 F. Supp. 478, 488 (1962).

We further disagree that this proceeding must be considered in conjunction with the issues in the Airline Industrial Relations Conference Investigation, Docket 23267. That proceeding presents independent issues and must be determined on its own merits.

Mohawk, as well as other mutual aid members affected by strikes, to find a resolution to their strikes throughout the course of difficult labor negotiations.[15] Indeed, in the period between 1968 and 1971, the number of strikes among Agreement members has been relatively minimal, compared to successful negotiations of labor settlements. During this period some 92 out of a total of 102 collective bargaining agreements entered into by carrier parties have been negotiated without a strike.[16]

Also of significance is a provision of the Mutual Aid Agreement itself which provides an additional incentive toward good faith bargaining. Payments are provided for under the agreement to the struck carriers only where the union has failed to follow the recommendations of a Presidential Emergency Board; or where the struck party *has in all respects acted in compliance with the Railway Labor Act* and a Presidential Emergency Board does not offer a solution. Should the carrier fail to bargain in good faith in negotiations for settlement of a strike, and hence be in violation of the Railway Labor Act, the carrier would not be entitled to Mutual Aid payments.

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[15] See, *e.g.*, Exhs. TCE-13, 22, 23; MO-C. Although the unions assert that the Northwest strike was prolonged by an alleged Railway Labor Act violation, against which a preliminary injunction was issued by a Federal District Court in Minnesota, the record fails to support their contention. The Mediator's Report attributes the continuation of the Northwest strike, after settlement of the economic issues, to matters unrelated to the alleged Northwest violation of the Railway Labor Act. In any event, the record does not reveal any reasonable connection between the Mutual Aid payments, and the alleged Railway Labor Act violation, even if it were assumed that such a violation did prolong the strike. Finally, even assuming such a connection, isolated instances of the nature of this alleged Railway Labor Act violation, which does not involve a refusal to bargain in good faith, would not, in light of the other considerations set forth herein, alter our conclusion that the agreement is consistent with the public interest, and should be approved subject only to the conditions imposed herein.

[16] TCE-11 (Rev.).

Opinion

In sum, we think that the Mutual Aid Agreement, as amended, does not relieve carrier management of significant economic pressure to settle a strike, even though it may enable a carrier to survive a strike without permanent financial instability. In other words, the Agreement does not upset the collective bargaining process, which depends on the stimulation of economic pressure on both sides of the bargaining table. We simply cannot conclude, on the basis of this record, that there is any likelihood that the mutual aid payments would contribute to the unnecessary prolongation of strikes or otherwise upset a fair economic balance between labor and management in any manner which would be contrary to the public interest. Rather, as the Board has previously found, we find again that the Mutual Aid Agreement represents a legitimate resort by the carriers to economic self-help, in a manner that is in no way inconsistent with the national labor policy.[17]

Nevertheless, the experience under the 1969 amendments to the Mutual Aid Agreement has been very limited, and, as noted, the period represents an atypical one in terms of airline prosperity. Accordingly, we believe it appropriate to limit our approval to a period of five years in order to provide an opportunity to reexamine the amended agreement in light of a broader base of experience under the new provisions.

We also disagree with the conclusion of the Administrative Law Judge that the amendments to the Agreement would be detrimental by reason of the adverse impact which the increased payments may have upon the non-struck carriers who must pay them under the Agreement, and that

[17] Mutual Aid Pact Investigation, 40 CAB 559, 561, 607-609 (1964). See also, N.L.R.B. v. Insurance Agents' International Union, 361 U.S. 477 (1960); Kennedy v. Long Island Railroad, 319 F. 2d 386 (1963), *cert. denied* 375 U.S. 830 (1963).

to resist what it considered to be a reasonable settlement, or to try to force unreasonable concessions on the part of labor.

The pressures for settlement of a strike arise most significantly, of course, from the major loss of revenues which might be anticipated but for the strike. These include not only the actual out-of-pocket losses occasioned within the strike period, but also the loss of profits which would have accrued had there been no strike. Moreover, in addition to the immediate financial repercussions, a strike produces a serious impact on the carrier's operations even after the strike has been settled. In addition to costs, such as crew training, associated with the resumption of operations, there is the immediate loss of post-strike revenue attribuable to the absence of advance bookings. Further, and of substantial significance, there is the long-term loss of traffic attributable to the loss of the carrier's identity in the market, part of which may be permanent by reason of changed travel patterns of the airline's customers. The detrimental impact of these post-strike factors necessarily become more severe the longer a strike continues.

There is, of course, the possibility that a relatively weak carrier might settle a strike upon terms it did not consider would be reasonable, in order to avoid permanent financial deterioration as a consequence of strike losses. In such circumstances, the absence of mutual aid payments, or the absence of the increases in the mutual aid payments, might result in the settlement of a strike (on the union's terms) earlier than would be the case had the carrier been better able to withstand the financial repercussions of a strike. Indeed, under such circumstances a carrier might be forced to accept demands which, in the long run, could have even more serious economic consequences for the carrier. The

mutual aid payments, in this respect, serve the purpose of protecting the carrier from being placed in the position where its precarious financial situation—rather than the merits of the negotiating positions—becomes the predominant factor in determining when a strike should be settled. The Board is unable to conclude that this purpose is contrary to the public interest.

In support of his conclusion that the increased payments posed tempting short-term benefits, Judge Present cited particularly certain "operating profits" experienced by National, Northwest, and Mohawk during their strike periods, which were attributable to the new higher level of the amended mutual aid payments, as well as TWA's decreases in losses. Thus the record shows[11] that National, for the strike period from January 31 to May 26, 1970, experienced a net profit of $810,000, following receipts of some $28 million in mutual aid. Northwest, for the strike period from July 9 to December 4, 1970, reported a net profit of $17.9 million, following receipts of $47.3 million in mutual aid payments. Mohawk similarly reported a profit of $29,000 in the first quarter of 1971 attributable to mutual aid payments for a part of its strike. However, if the financial results of the full strike period in which Mohawk participated in the Agreement are included (including an additional six days in April, *i.e.*, January 1 to April 6, 1971), the net is a loss of $426,000. In addition, for the two-day TWA strike (October 20-21, 1970), TWA reduced its net loss from $3.3 million, during the strike period, to

[11] Serious strikes occurred on Air West and Northwest Airlines following close of the hearings in this case. The facts regarding these strikes, and data concerning the relationship between the mutual aid payments and strike losses are therefore outside the record. However, based on these carriers' financial reports to the Board, we find that had such facts been included in the record, they would not have altered our conclusions herein.

$879,000 by reason of $2.5 million in mutual aid payments. TWA experienced extraordinary losses in 1970, and the $879,000 net loss was less than the $1.7 million loss projected for this period assuming there had been no strike.[12]

However, as previously noted, there must be considered not only the direct operating results during the actual strike period, but the loss of normal profits during such strike period, and post-strike losses, as well. The Administrative Law Judge's analysis is based on strikes which occurred primarily in 1970, an atypical year which reflected losses by many carriers. Nevertheless, even in this period, in the absence of the strike National and Northwest reasonably estimated that their profits would have been some $6 million and $29 million, respectively. Taking into account loss of estimated normal profits, strike period losses, and post-strike losses, neither of these two carriers recovered even 60% of their total losses attributable to the strike. National suffered total strike losses of $47.4 million ($6 million estimated normal profit; $27.2 million strike-period losses; and $14.2 million post-strike losses), against mutual aid receipts of $28 million. Northwest suffered total strike losses of $87.5 million ($29.3 million estimated normal profit; $29.3 million strike-period losses; and $28.9 million post-strike losses), against mutual aid receipts of $47.3 million. The losses for each of these carriers, as a result of their strikes (taking into account the anticipated profits which they otherwise would have achieved, as well as post-strike losses) amounted to some $19.4 million and $40.2 million, respectively, even after receipt of the increased mutual aid payments. Thus National recovered only some 59.1% of its total strike losses in mutual aid payments, while Northwest's mutual aid payment recovery represented only some

[12] Source: TCE-53, MO-6.

strike losses resulting in ruinous financial instability. Hence, such carriers may reasonably think they need the protection afforded by mutual aid "insurance." The choice of whether to pay what it costs to have such insurance is of course for the individual carrier to make, but if the carrier chooses to do so, we are not disposed, on this record, to foreclose that choice.

III.

We further find that participation in the agreement by the local service carriers would not be adverse to the public interest, provided it is made subject to an appropriate subsidy condition. Accordingly, the Agreement should, in this respect also, be approved. The same considerations which have led us to conclude that the Mutual Aid Agreement provides, at a reasonable cost, substantial protection from crippling strike losses, and therefore is consistent with the public interest, similarly apply to the local service carriers. Indeed, in many respects, the local service carriers, which as a group have less financial stability than the trunkline carriers, require such protection to a greater extent. Local service carriers simply do not have the financial depth which will permit them to absorb what may be huge strike losses.

The Administrative Law Judge considered that local service carriers should not be permitted to participate in the agreement. He reasoned that such participation would be inconsistent with the scheme for subsidy payments pursuant to section 406 of the Act, would represent an unwarranted financial gamble by the local service carriers and the Board, and would represent an unjustified financial drain on the trunkline carriers. We are not persuaded by these arguments.

We believe that with an appropriate subsidy condition there will exist no inconsistency between the local service carriers' participation and the section 406 subsidy provisions. The condition would provide that no payment or obligation incurred pursuant to the Agreement may be claimed as an expense for purposes of computing subsidy need under section 406 of the Act. We recognize that without such a condition, subsidy might indirectly provide strike support for carriers that have no subsidy need or entitlement under the standards of section 406 of the Act. While the Mutual Aid represents in our view a legitimate "self-help" form of strike insurance, we believe that it is not in the interest of the public to underwrite this form of strike insurance by Federal subsidy.[27]

We reject, as placing form over substance, the contention that the Mutual Aid payments would inevitably be funded by Federal subsidy because there is no practical means for segregating the subsidy funds from the carriers' general funds from which Mutual Aid payments might be drawn. Subsidy payments normally make up a very small portion of a carrier's overall revenues. So long as Mutual Aid payment expenses are excluded from the subsidy computations, there is no basis for concluding that the Mutual Aid payments would, in any realistic way, be funded by subsidy payments.

It is urged to us that subsidy ought not be paid unless actual operations are conducted, and hence should not be payable during strikes. From this premise it is argued that Mutual Aid payments are inconsistent with the Act because by definition they are paid during a strike when the

[27] *Cf.*, Mutual Aid Agreement Between American Airlines, Inc. and Mohawk Airlines, Inc., Order E-24213, September 23, 1966; Pan American Mail-Rate Case, 35 CAB 540, 555 (1962).

carrier is not operating. Even assuming the correctness of the premise, we reject this argument. So long as a local service carrier's participation in the Mutual Aid Agreement does not increase the level of Federal subsidy paid to the carrier, we can perceive no inconsistency between the Agreement and the subsidy scheme of the Act arising simply because Mutual Aid payments might be received in periods when subsidy was not payable. We find nothing in the Act forbidding a carrier to receive private funds from legitimate sources during a strike. Similarly, the argument that participation represents an unwarranted gamble for both the local service carrier and the Board, fails to convince us. There is, of course, no assurance that receipts will exceed payments. However, as noted, membership is in effect a type of insurance which, for a reasonable and limited cost, provides the local service carriers with significant protection against the financially crippling and far greater losses that might be suffered as a result of a strike. Thus, for example, Piedmont has a maximum annual participation of from $500,000 to $600,000 based on its revenues. In contrast to this limited maximum annual participation, it would have received payments as a result of its 28-day 1969 strike amounting to $1.8 million to offset a strike loss of some $2.2 million, had it been a Mutual Aid participant at that time.[29] The one-percent limitation provides reasonable assurance that no local service carrier will be seriously adversely affected by payments under the Agreement.

It is also argued that trunklines may make Mutual Aid payments which are proportionally higher than local ser-

[28] But see, American Overseas Airlines, Inc. v. C.A.B., 254 F. 2d 744 (1958).

[29] Exh. PI-6.

vice carriers would have to make and that this higher proportion is a financial drain adverse to the public interest. We are not persuaded. First, as we have noted, the Agreement provides reasonable assurance that the financial drain to the extent it may exist, will be borne by those carriers which, on the basis of total revenues, are in the best position to incur it. Second, we do not find that the potential receipts which a carrier may derive from the Agreement in the event of a strike are unreasonably disproportionate to the potential payments which that carrier may have to make to another carrier in the event of a strike on the second carrier. Moreover, it does not appear unreasonable to us for the trunkline carriers to seek, and pay a price for some protection against the possibility that a local service carrier, solely by reason of its relatively weak condition, might succumb to employee demands which otherwise would be unacceptable and which could then be demanded of the trunkline carriers as a new industry norm.

It is unfortunate, of course, that all the participants in the Agreement will suffer economic loss by reason of a strike on one carrier participant. However, in our view, the Agreement equitably and reasonably distributes that loss among all the participants.

IV.

Looking at the Mutual Aid Agreement as a whole, we are mindful of the views of some that there would be fewer and shorter strikes if there were no Mutual Aid Agreement because there would be greater economic pressure on a carrier to settle. We are also mindful of the very real hardships which work stoppages in the airline industry inflict on the public. Serious personal inconvenience or

the amended Agreement is defective in that it does not attempt to differentiate among such carriers on the basis of their financial health. The plan, in effect, constitutes a form of strike insurance. Strike insurance not markedly dissimilar from that here involved has previously been considered by the courts as being consistent with the national labor policy.[18] In effect, the carrier parties to the Agreement are paying premiums based on collective loss experience, to provide protection against the possibility of far greater, and perhaps financially crippling, losses that would inevitably be suffered as a result of a strike.

The plan does not, of course, attempt to provide any assurance that the receipts, in the event of a strike, would be equivalent to the payments made under the plan in any given carrier case. As the trunkline carriers point out, nevertheless, since 1960 every present trunkline member of the Mutual Aid Agreement has suffered at least one strike, and 6 of the 9 members have been struck since 1969.[19] And as we have shown, the potential strike losses are indeed formidable.

Each individual carrier's mutual aid payments are modest in comparison. Thus, for the period January 1, 1970 to June 30, 1971 (the period in which the higher level of supplemental payments was in effect) the trunkline carriers' contributions to supplemental payments represented a range from .44% (for Eastern and Continental) to .50% (for Braniff and United) of their operating revenues for the same period. American's, Pan American's and TWA's percentages were .46%, .48% and .46%, respectively. The percentages for the local service carriers, with the excep-

[18] See, Kennedy v. Long Island Railroad, 319 F.2d 387 (1963), *cert. denied* 375 U.S. 830 (1963), affirming 211 F. Supp. 418 (1962).

[19] TCE-4.

tion of North Central (.03%), were each .04%.[20] (See Attachment 1.)

This level of payments may be contrasted with the ratio of National's, Northwest's and Mohawk's strike losses to each carrier's operating revenues for the year preceding the strike. These losses represented for National 17.7%,[21] for Northwest 18.8%,[22] and for Mohawk 16.8%,[23] of the carriers' prior year's operating revenues.

In addition, a substantial safeguard is provided in that no carrier can be required to make contributions to the plan, in the form of supplemental payments, in an amount exceeding one percent of its operating revenues for the previous calendar year.[24] While the one-percent limitation may not be perfection in insuring against detrimental impact upon member carriers, it does offer significant protection reasonably related to the ability of carriers to pay. Similarly, the proportional share of a carrier's contribution to supplemental payments made to a struck carrier is based on the paying carrier's previous year's revenues. Thus,

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[20] Not included are National, Northwest and Mohawk whose revenues were significantly affected by lengthy strikes during the period, and Western which did not become an agreement participant until October 3, 1970.

[21] 1969 operating revenues, $268 million. Strike losses, $47.4 million (see p. 13, *supra*).

[22] 1969 operating revenues, $465 million. Strike losses, $87.5 million (see p. 13, *supra*).

[23] 1969 operating revenues, $66.2 million. Strike losses for the total period of the strike (Nov. 1970 to Apr. 1971), $11.1 million (including only actual losses during the strike period) (Exh. MO-6). Mohawk became a Mutual Aid participant on January 1, 1971.

[24] There is, of course, a high probability that this 1% contribution would not be required in many years, particularly in light of the increased representation of the air carrier industry reflected by the present air carrier participation. For example, for the 1970-June 1971 period (Attachment 1), in which several serious strikes occurred, the 1% limit was not reached.

the contribution is reasonably related to the losses that might be anticipated in the event of a strike, and these payment criteria provide additional protection against unduly burdensome payments.

While, as Judge Present points out, it is possible for the one-percent limitation to be exceeded by reason of the windfall payments,[25] it does not follow that any increased detriment would be incurred. Windfall payments by definition represent added profits attributable solely to the strike.[26]

We are therefore of the view that the plan does provide substantial protection from financially crippling strike losses, at a cost which is reasonable. It may be that the higher payments will impose a certain financial burden on carriers which may be financially weak. For the reasons indicated, we think this burden, unlike potential strike losses, will not be a crippling one. In any event, such carriers are precisely those which are most vulnerable to strike threats and which could, in the absence of mutual aid payments, face a choice between acceeding to demands creating expenses far exceeding strike losses or incurring

[25] The one-percent limitation applies only to supplemental payments, not to windfall payments.

[26] The Administrative Law Judge, utilizing an analysis based on the rate of return on investment of the respective carriers, urges that the payments are inequitably distributed among the paying carriers. We find this analysis unpersuasive. For example, although United had a lower rate of return on investment than other carriers, its revenues are significantly higher than carriers with a higher rate of return on investment, and hence it is capable of making substantially higher mutual aid payments. Thus, although United's payments of some $21.9 million in mutual aid payments (more than one-half of which were windfall payments) for the period January 1, 1970 to June 30, 1971 (the period in which the higher level of payments was in effect) represented the highest payments of the carrier parties to the Agreement (J.D., App. E), the payments represented only .99% of its $2,213,000,000 [illegible] revenues for this period. The highest payment in terms of percentage of revenues (Eastern's 1.34%) included some 61% in windfall payments (see Attachment 1).

2. That except to the extent granted herein, the application and all other requests herein, should be denied or dismissed.[31]

An appropriate order will be entered.

BROWNE, Chairman, GILLILLAND, Vice Chairman, and TIMM, Member, concurred in the above opinion. MINETTI and MURPHY, Members, filed the attached joint concurrence and dissent.

[31] A motion filed by the Air Line Pilots Association, requesting an order requiring Northwest Airlines to return, or to place into escrow, all Mutual Aid payments received pursuant to the amendments disapproved by Administrative Law Judge Present, and barring or escrowing such future payments, was withdrawn as part of the settlement of the Northwest strike, and accordingly, will be dismissed.

PERCENT OF MUTUAL AID PAYMENTS
TO CARRIER REVENUES
1970 — JUNE 1971

Carriers*	Revenues ($000) (1970-6/71)	Payments ($000) Wind.	Supp.	Total	Percent of Payments to Revenues Wind.	Supp.	Total
TRUNKS							
American	1,701,893	3,136	7,880	11,016	.18%	.46%	.65%
Braniff	485,139	175	2,407	2,582	.04%	.50%	.53%
Continental	439,508	1,017	1,913	2,960	.24%	.44%	.67%
Eastern	1,498,282	13,440	6,571	20,011	.90%	.44%	1.34%
Pan American	1,661,428	2,286	7,937	10,223	.14%	.48%	.62%
TWA	1,716,770	1,310	7,962	9,272	.08%	.46%	.54%
United	2,213,133	10,967	10,961	21,928	.50%	.50%	.99%
LOCAL SERVICE							
Frontier	138,384	—	59	59	—	.04%	.04%
Hughes Air West	113,635	—	50	50	—	.04%	.04%
North Central	139,554	—	43	43	—	.03%	.03%
Ozark	107,851	—	42	42	—	.04%	.04%
Piedmont	108,925	—	41	31	—	.04%	.04%

* Not included are National, Northwest and Mohawk whose revenues are substantially affected by lengthy strikes during the period, and Western which did not become a Mutual Aid party until October 3, 1970.
Source: CAB Air Carrier Financial Statistics; I.D. App. E

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MINETTI and MURPHY, Members, Concurring and Dissenting:

We cannot join the majority in giving unqualified approval to the Mutual Aid Agreement in its currently amended form. At the same time, we do not urge total disapproval of the Agreement. Rather, we would allow the Agreement to stand in the form in which it existed prior to the major amendments of October 1969, which increased both the level of "supplemental" payments to a struck carrier and the maximum annual obligation of a participating carrier to make such payments.[1] We also would approve, subject to the subsidy condition imposed by the majority, the December 1970 amendment which permits participation in the Agreement by local service carriers. However, we would disapprove as adverse to the public interest the October 1969 amendments relating to increased "supplemental" payments. Finally, we would remand for further hearing the issue of whether an additional condition should be imposed precluding payment of benefits under the Agreement to a struck carrier which has violated the Railway Labor Act subsequent to the commencement of a strike.

In letting stand the Mutual Aid Agreement as it existed prior to October 1969, we do not consider it necessary to find, and do not find, that the Agreement has been or will be affirmatively beneficial to the public interest, either by contributing to the "stability" of airline industrial relations or by assisting carrier managements in resisting union wage demands. In this connection, we regret that the Board's majority opinion here goes as far as it does in seeming to identify the public interest with strengthening the bargaining position of carrier management in airline

[1] The lesser amendments of October 1969 give us no concern and, like the majority, we would approve them.

labor disputes, which is the evident purpose of the Mutual Aid Agreement. Such an air of partnership between management and labor by a regulatory agency is antithetical to the national labor policy, and should be strictly avoided.

The Board's dilemma, of course, is a real one: under most circumstances, in view of its promotional role toward the air transportation industry and its regulatory responsibilities toward the traveling public, the Board is bound to regard whatever lowers airline costs as good, and whatever increases those costs as bad. Nevertheless, the Board cannot take that attitude toward airline wages without becoming a partisan on the side of management against labor. We do not suggest that the Board majority has here in any way deliberately set out to align itself with one side or the other of airline labor disputes. Nonetheless, it is difficult to read the majority opinion as a whole, with its recurrent emphasis on the "stability" assertedly afforded by the Mutual Aid Agreement and one the "reasonableness" of management positions (with no explicit recognition that union positions may be equally reasonable from the standpoint of the workers' interests), without deriving a distinct impression that the majority believes that strengthening management's bargaining power in wage disputes is an affirmatively beneficial thing.

However difficult it is for the Board to preserve a stance of total neutrality in labor-management conflicts, once the parties have fulfilled their statutory obligations under the Railway Labor Act, we believe the Board must bend every effort to do so. To that end, we would rigorously avoid making any judgments as to the reasonableness of either management or union positions and actions, either in gen-

worse to travelers, economic loss to shippers and consumers, lower revenues to airport operators, foreclosure of numerous business opportunities and reduced economic life to the community as a whole—all are the immediate results of airline strikes, particularly over routes which only the struck carrier is authorized and willing to serve.

Obviously, a strike is far from the ideal way of resolving labor disputes. Fortunately, as the record reveals, the great majority of labor disputes are resolved by negotiation between the parties without recourse to a strike. Nevertheless, under the national labor policy, a strike remains available as an ultimate resource in reaching an accommodation between employee demands and terms acceptable to managements.

Whether the disruption caused by work stoppages in the air transportation field is sufficient to warrant revision of the national labor law so as to prevent or control them is a question of policy for the Congress. However, we do not believe the appropriate remedy is to compel carriers—whether by law or by undue economic pressure—to accept all requests of employees, just as we would not agree that employees should be forced to accept all proposals of carrier managements.

Collective bargaining in good faith remains the cornerstone of national labor policy. Collective bargaining is encouraged when there is substantial economic pressure on both sides of the bargaining table. As we have observed, the perishable nature of air transportation makes individual carriers peculiarly vulnerable to strike threats. The Mutual Aid Agreement is an effort on the part of the carriers collectively to strengthen the bargaining position of the individual carrier. We conclude that it is not contrary to the public interest for the carriers to do so, in the form and

to the extent provided in the Agreement now before us. As we have found, the Agreement does not so alter the bargaining balance as to lift from the carriers heavy economic incentive to settle work disputes and hence does not remove the pressures essential for collective bargaining in good faith. At the same time, the Agreement does afford the carriers a greater measure of influence over labor costs ultimately are reflected in higher fares and rates to the traveling and shipping public, additional restraints consistent with collective bargaining are, in our opinion, not contrary to the public interest.

We have given due consideration to all of the contentions of the parties and find, except to the extent indicated, that they do not alter our decision.

Accordingly, in view of the foregoing and all the facts of record, it is found:

1. That the Airlines Mutual Aid Agreement, including the Airlines Mutual Aid Agreement as amended by the amendments of October 1969 and December 1970, is not adverse to the public interest or in violation of the Act and should be approved for a period of five years, subject to the following conditions:

(a) The approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act;[30]

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[30] We find no justification for departure from those conditions which have been attached to our approval of the Mutual Aid Agreement since 1959, so as to include the condition proposed by ALPA that would provide that Mutual Aid payments should be excluded from allowable expenses for determining rates under the Federal Aviation Act. The question of the allowance of such expenses in connection with rate proceedings is more appropriately reserved for consideration in connection with such rate proceedings as may come

(b) The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

(c) Approval of participation in the Agreement by each carrier party thereto is subject to the condition that no payment or obligation incurred pursuant to the Agreement shall be claimed as an expense for purposes of computing the need of such carrier for compensation payable by the Board under section 406 of the Federal Aviation Act; nor shall any carrier be entitled to receive any compensation payable by the Board for payments made or obligations incurred by that carrier pursuant to the Agreement;

(d) In accounting for the amounts due to others and the amounts due from others under the Agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by Part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the Agreement as may be reasonably required by the Director of the Board's Bureau of Operating Rights; and

(e) Copies of all arbitrators' decisions and awards issued under the Agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

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before the Board. It is sufficient to provide, as we have in the past, that our approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act.

eral or in relation to particular disputes.[2] We would recognize that "reasonableness" in labor disputes is a term with no fixed or generally agreed meaning, and one which inevitably takes on quite different connotations on opposite sides of the bargaining table.

Accordingly, we would abandon all attempts to find affirmative public benefits in the Mutual Aid Agreement, and instead would let it stand (in its pre-October 1969 form) as being simply neutral *vis-a-vis* the public interest. It is by now firmly established that agreements of this sort among employers in the same industry are a legitimate and permissible form of mutual economic self-help, just as are mutual assistance agreements between labor unions.[3] Given the national policy of strict governmental neutrality in labor disputes, we think the proper basis for letting the Agreement stand is simply that carrier managements should not be precluded from engaging in any lawful measure of self-help unless it is affirmatively shown to be detrimental to the public interest. In our view, based on the evidence of record in this proceeding, the Mutual Aid Agreement as it existed prior to the October 1969 amendments meets this negative test.[4]

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[2] In a few limited areas, such as subsidy, the Board may be required in some circumstances to draw conclusions as to the reasonableness of management or union conduct. See *Reopened Transatlantic Final Mail Rate Case*, 42 C.A.B. 195, 199-204 (1965), affirmed *sub. nom. Trans World Airlines* v. *C.A.B.*, 385 F.2d 648 (C.A.D.C. 1967), *cert. denied*, 390 U.S. 944 (1968). It ought, however, to avoid such judgments wherever possible, particularly in view of its frequently acknowledged lack of any special expertise in this area.

[3] See *Kennedy* v. *Long Island R.R.*, 319 F.2d 386 (1963), *cert. denied*, 375 U.S. 830 (1963); *NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. 477 (1960).

[4] When the Board in 1964 renewed its original approval of the Mutual Aid Agreement, we were both of the view that the Agreement in its then existing form would be a source of disruption and insta-

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Similarly, once it is assured that mutual aid payments will not be permitted to increase carrier subsidy, we see no justification for excluding the local service carriers equally as entitled as the trunkline carriers to band together for mutual self-help in labor negotiations, and it can hardly be contended that wage standards in the two sectors of the industry are unrelated or that labor settlements in one sector do not materially influence negotiations in the order. The limitations on a participating carrier's mutual aid obligations under the Agreement, together with the local service carriers' present-day low ratio of subsidy receipts to commercial revenues, insure as a practical matter that any mutual aid payments by local service carriers will come out of commercial revenues and not out of subsidy. We agree that the majority's proposed condition is adequate to insure that subsidy will not be increased as a result of mutual aid payments. This disposes of the argument that the weight of governmental subsidy will be thrown on the management side of the bargaining scales.

However, in our judgment the increased level of "supplemental" strike payments provided by the October 1969

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bility in airline labor relations. Member Minetti took this view as to the entire Agreement, Member Murphy only as to the "supplemental payments" provisions which had been added to the original "windfall" clause of the Agreement. *Mutual Aid Pact Investigation*, 40 C.A.B. 559, 564 (1964) (dissenting opinions).

Member Murphy has now concluded on the basis of the present record that his earlier fears have not been borne out by the experience of the years 1964-69, and hence would approve the Agreement as it stood prior to the October 1969 amendments, on the basis of the negative public-interest test described in the text *supra*. Member Minetti continues to view the Agreement as provocative toward labor and as generally inimical to good labor relations in the airline industry, and accordingly he cannot give it his approval; he acknowledges, however, that the evidence of record does not affirmatively bear out his earlier fears of disruption, and therefore does not now urge that the Agreement be disapproved.

amendments to the Mutual Aid Agreement creates a different situation—one in which there is a distinct danger that labor peace will be disrupted and interruptions of airline service prolonged by the level of payments available under the amended Agreement. In this regard we agree with the conclusions of the administrative law judge who heard the testimony of the witnesses.

The 1969 amendments increased the level of "supplemental" payments to a struck carrier from 25 percent of its normal pre-strike operating expenses to a sliding scale beginning at 50 percent of normal expenses for the first two weeks of a strike and declining by 5 percent increments to a level of 35 percent of normal expenses for the fifth and subsequent weeks. Whereas the earlier 25 percent level of supplemental payments generally did not fully reimburse a struck carrier for its actual out-of-pocket running expenses during a strike, the new 35-50 percent level tends (and, indeed, was designed) to exceed a struck carrier's actual running expenses, so that in work stoppages occurring under the amended Agreement it has become typical for the struck carrier to show an operating profit during the strike period. To make possible these increased supplemental payments, the 1969 amendments also raised the annual ceiling on each participating carrier's obligation to make such payments from ½ to 1 percent of its operating revenues in the preceding calendar year.

The administrative law judge found that the increased level of supplemental payments under the 1969 amendments creates a dangerous inducement to a struck carrier in some circumstances to prolong a strike unnecessarily for the short-term benefits of the increased payments. He also found that the increased ceiling on participating carriers' supplemental payments obligations involves a threat

to the financial soundness of the paying carriers, particularly those already in financial distress for other reasons. He considered these twin dangers sufficiently serious, and their consequences sufficiently adverse to the public interest, to warrant disapproval of the two major October 1969 amendments to the Agreement.

Although the Board majority inferentially admit that the increased level of supplemental payments is bound to influence carrier managements in the direction of holding out against union demands,[5] they argue that this is not contrary to the public interest since management's bargaining power in the airline industry is unduly weak to begin with, as a result of the perishable nature of the industry's product. They also cite statistics tending to show that airline wages have increased more rapidly than those in other transportation industries; than the consumer price index (during 1967-70); than airline employee productivity (after 1968); or than airline wages themselves before the 1969 amendments.

All of these arguments we find quite irrelevant. There is no showing that air transportation is more vulnerable to strikes than other service or perishable-goods industries, and we are aware of no requirement of the national labor policy that all industries must be put on the same bargaining footing as hard-goods manufacturing industries. As for the majority's statistics, in each case they ignore other factors which would appear to account adequately for the results, without assuming any exceptional weakness of

[5] According to the majority, it is only "unreasonable" union demands which will thus be resisted. But one man's unreasonable demand is another's reasonable request; as we have already pointed out, it is both futile and contrary to the Board's proper role as a neutral in labor conflicts to attempt to analyze the effects of the mutual aid amendments in these terms.

airline management's bargaining position in labor negotiations.[6] In our view, the issue is not whether the strengthening of airline management's bargaining position which obviously results from the 1969 mutual aid amendments is a good thing *per se*—a judgment which in our view the Board need not and should not make—nor is it whether airline employees retain effective bargaining power, which they patently do. The issue, rather, is whether under some significant sets of circumstances the 1969 amendments may give carrier management an incentive to act irresponsibly in prolonging a strike.

In our view the administrative law judge was right in his assessment of this danger. The critical point is that under the 1969 amendments a struck carrier's mutual aid benefits can be so generous that it can show an operating profit while its operations are shut down by a strike.[7]

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[6] Thus, while airline wages have increased more rapidly than those in other transportation industries, for most of the period under discussion airline revenues, profits, and productivity likewise grew much more rapidly than those of the other industries, so that generous wage increases, higher than in other industries and well in excess of increases in the cost of living, were readily supportible. Such wage trends have a momentum of their own, so it is not surprising that airline union wage demands continued high even after industry profits turned downward, especially in view of the accelerating inflation of the latter years. Productivity after 1968 fell off largely because of circumstances—the fall-off in traffic growth and the consequent glut of capacity and sharply lower load factors—over which employees had little or no control. Moreover, wage increases in excess of productivity gains are typical of a period of inflation, and are in no way unique to the airline industry. Similarly, the majority's attempt to draw conclusions from the fact that airline employment costs increased more rapidly in 1970, under the amended Agreement, than in 1967, 1968, or 1969, ignores the markedly higher rate of inflation in the later year. We agree that these statistics do not show that the 1969 mutual aid amendments deprived airline employees of effective bargaining power, but they also do not rebut the administrative law judge's concern over the danger of needlessly prolonged work stoppages.

[7] From the record it is not possible to determine whether such strike-period operating profits will occur in all cases or only in some, but clearly they are a definite possibility and do not represent simply a freak situation unlikely to recur in the future.

This seems to us a fundamentally unhealthy situation, conducive to results adverse to the public interest, much as would be in insurance scheme which resulted in the insured collecting more than the value of his loss.

To be sure, as the majority point out, the struck carrier also foregoes its "normal profits" while the strike continues. But this factor cannot always be relied on to give the struck carrier the strongest incentives to settle the strike. In several of the strikes which have occurred since the 1969 amendments took effect, the struck carrier was not in fact earning "normal profits" or indeed any profits immediately prior to the strike, and so did not forego such profits as a result thereof. This situation may well recur in future strikes[8]—particularly if, as the carriers claim, the unions concentrate their strike threats on weak carriers.[9] Even where a carrier is operating profitably on an annual basis, there are frequently "off-season" months during which it expects to lose money; if a strike occurred at such a time, the carrier would not be deterred from prolonging it unnecessarily by a loss of "normal profits".

The majority also point to post-strike losses, which are not directly compensated by mutual aid payments, as a strong inducement to prompt settlement of strikes. But, while we do not deny the reality of post-strike losses, their incidence and measurement is a matter of great complexity

[8] We think the majority are much too quick in dismissing 1970 as an "atypical year" in this connection. We note, also, that in other contexts the majority are quite prepared to rely on 1970's experience where it suits their purpose.

[9] It should be said, however, that the record gives little or no support to this contention of the carriers. On the contrary, it would appear that if anything it has been the more profitable carriers which have suffered the longest and most costly strikes, although the correlation between profitability and strike losses is certainly low. (See I.D., Appendices C through G.)

and involves a considerable degree of speculation. It is surely significant that the participating carriers have never been able to agree among themselves on a valid measure of post-strike losses, so as to permit their direct compensation under the Mutual Aid Agreement. Clearly a great many factors go into determining how serious post-strike losses will be: a struck carrier will presumably regain its normal level of traffic more quickly in monopoly than in competitive markets, and in the latter it will make a great difference whether its principal competitors were also struck or were operating. It is by no means clear from the record that prospective post-strike losses increase in any simple way in direct proportion to the length of a strike.[10] Accordingly, it might well happen that, once a strike commenced, the struck carrier's management could believe that most of the prospective post-strike losses were already accrued and inevitable, and would not be greatly increased by a delay (within limits) in settling the strike.

We cannot demonstrate that any of these situations have in fact occurred since the 1969 amendments were adopted. As the record in this proceeding amply demonstrates, it is extremely difficult to sort out the underlying motivations in the various actions of the parties to a labor dispute, and attempts to do so are seldom profitable. All that can be said with reasonable confidence is that such situations *can* occur, and that when they do the monetary incentives for carrier management to settle a strike as soon as reasonably possible will be seriously weakened.

We do not ignore the other institutional incentives which militate for each settlement of a strike. But labor disputes

[10] For example, the cost of requalifying pilots appears to be an either-or proposition which, once incurred, does not increase with the further prolongation of the strike. Similarly, post-strike traffic demand will be profoundly influenced by seasonal factors.

are not feasts of pure reason; strong human emotions are frequently generated, even in men charged with managing giant organizations. Thus, in the interests of minimizing disruption due to strikes, it is desirable that there always be strong financial motives on both sides for the prompt settlement of disputes, both prior to a strike and after one has begun. We agree with the administrative law judge that the 1969 mutual aid amendments, by making it possible for a struck carrier to show an operating profit during the strike period, go too far in reducing the financial incentives for carrier management to settle a strike promptly once it has begun.

We also agree with the judge—though this in our view is a lesser factor—that the increased liability of participating carriers to pay supplemental benefits under the 1969 amendments poses an unacceptable threat to the financial stability of the paying carriers. As the judge pointed out, the defect of the Agreement's provision for supplemental payments is that it takes no account of the current financial condition of a paying carrier; and, indeed, the bulk of the mutual aid payments since the 1969 amendments took effect have been to otherwise highly profitable carriers from carriers who were currently either losing money or earning less than a reasonable return on investment.

The 1969 amendments' increase in the level of and ceiling on supplemental payments markedly aggravates the ability-to-pay problem which existed under the prior agreement. In an 18-month period under the 1969 amendments nearly as much ($83.6 million, 60 percent of it in supplemental payments) was paid out under the Mutual Aid Agreement as in the preceding 8 years ($87.7 million, only 22 percent of it in supplemental payments). During the same 18-month period over $10 million in mutual aid pay-

ments (nearly 80 percent supplemental) were assessed against Pan American, a carrier whose operating losses were and have continued to be so substantial as to occasion serious Board concern.[11] Particularly in view of the potentially adverse effect on carrier incentives created by the increased supplemental benefits payable under the 1969 amendments, we think the price to those participating carriers already in financial difficulties is too high to be in the public interest.

The remaining issue which we do not consider to have been adequately dealt with is that of Railway Labor Act violations occurring after a strike has begun. The union parties call to our attention the fact that, in the course of the Northwest-BRAC strike in 1970, a U.S. District Court in Minneapolis ruled that Northwest had violated the Railway Labor Act by offering improper inducements to certain of its striking employees to quit the union. A temporary injunction was issued.[12] This violation took place after the strike had begun, and thus by definition could not have had anything to do with causing it. However, the union parties assert that the violation resulted in prolonging the strike because, after agreement was reached on the economic issues which were the strike's cause, the carrier insisted on including in the back-to-work agreement provisions which the unions contended would require them to ratify the carrier's Labor Act violations.

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[11] Pan American's over $10 million in mutual aid payouts during this period contrasts with the less than $10 million in revenue diversion from this carrier which a majority of the Board recently held posed so great a danger to the carrier's financial integrity as to require disapproval of a route acquisition agreement between two other carriers. *Eastern-Caribair Acquisition Agreement*, Order 72-10-90, October 30, 1972.

[12] No final adjudication was had in this court case, which was dismissed by agreement of the parties upon settlement of the strike.

Opinion

In its prior approvals of the Mutual Aid Agreement, the Board has always placed great stress on the provision of the Agreement limiting the class of cases in which benefits are payable to those, *inter alia*, where a strike has been called in the absence of a Presidential emergency board "and the struck party has in all respects acted in compliance with the Railway Labor Act."[13] We agree that, if the Agreement is to be approved at all, it is essential that mutual aid not be payable where a strike has resulted from a carrier's violation of the Railway Labor Act.

The Northwest-BRAC strike incident, and another apparently similar incident during the more recent Air West-AMFA strike,[14] raises for us the question of whether mutual aid should continue to be paid in the event a carrier violates the Railway Labor Act after a strike is called, at least where the violation results in prolonging the strike. Although the above-quoted language of the Agreement is not completely free of ambiguity, it appears only to require compliance with the RLA by a struck carrier up to the time the strike is called, and not thereafter.[15] This

[13] Agreement, paragraph 1.(A)(ii); see I.D., Appendix A, p. 2.

[14] Press accounts (*Aviation Daily*, January 11, 1973, p. 58) indicate that a National Mediation Board arbitrator has recently ruled that Air West violated the Labor Act in certain respects after its strike began. Whether this violation arguably prolonged the strike is unknown. There is nothing in the present record concerning this incident, which occurred after the record was closed.

[15] The majority apparently think otherwise; they state (Opinion, p. 16) that, "Should the carrier fail to bargain in good faith *in negotiations for settlement of a strike*, and hence be in violation of the Railway Labor Act, the carrier would not be entitled to Mutual Aid payments." (emphasis added) We are not informed as to the basis for this interpretation, which appears to be more of a dictum than a firm condition to approval of the Agreement; nor are we aware that the parties to the Agreement have ever so interpreted it. Perhaps this matter could be explored further on reconsideration, or better yet on the remand which we recommend.

suggests the possibility that the Board's approval of the Agreement should be conditioned so as to require continued compliance with the Labor Act after a strike is called.

This issue seems to us to be of sufficient importance to warrant further consideration by the Board. We do not think it can be adequately dealt with on the present record. The Northwest-BRAC strike incident was litigated, but only in a somewhat desultory way; we do not have the benefit of findings thereon by the administrative law judge.[16] The Air West-AMFA strike occurred after the record here was closed, and thus has not been explored in the hearing process. Otherwise, there has been little discussion of post-strike-commencement RLA violations, and virtually none of the problems which might be encountered in conditioning the Agreement in the manner we have suggested, or of the precise form and scope of such a possible condition. Accordingly, we would remand the proceeding to an administrative law judge to take further testimony and present a new initial decision discussing the problems of, and possible remedies for, post-strike-commencement Labor Act violations.

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[16] The majority's attempt to dispose of the Northwest-BRAC incident in a footnote (Opinion, p. 16, note 15) seems to us entirely unsatisfactory. We do not believe the record has been sufficiently well developed on this point to permit a determination of whether the RLA violation found by the court did or did not, in conjunction with other actions of the carrier, directly or indirectly contribute to prolonging the strike. (We recognize that the mediator's report attributes the continuation of the strike after the economic issues were settled principally to other factors, but that is not necessarily decisive for present purposes.) The majority's attempt to shrug off the violation even if it did prolong the strike is unexplained, and seems wholly arbitrary. As for the distinction, obscurely suggested by the majority's footnote, between failure to bargain in good faith and other types of RLA violations, we see no comprehensible basis for such a distinction, which is not suggested by any earlier Board opinion relating to the Mutual Aid Agreement. Only further exploration upon a remand, in our view, can resolve these ambiguities and obscurities.

Opinion

Order 73-2-110

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C. on the
27th day of February, 1973

AIRLINES MUTUAL AID AGREEMENT

Docket 9977
Agreement CAB 21445
21445A1
21445A2
21445A3

Order

A full public hearing having been held in the above entitled proceeding, and the Board, upon consideration of the record having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That Agreement CAB 21445, as amended by Agreements CAB 21445A1 through A-3 (hereinafter referred to as the "Agreement"), be and it hereby is approved, for a period of five years, subject to the following conditions:

(a) The approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act;

(b) The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

(c) Approval of participation in the Agreement by each carrier party thereto is subject to the condition that no payment or obligation incurred pursuant to the Agreement shall be claimed as an expense for purposes of computing the need of such carrier for compensation payable by the Board under section 406 of the Federal Aviation Act; nor shall any carrier be entitled to receive any compensation payable by the Board for payments made or obligations incurred by that carrier pursuant to the Agreement;

(d) In accounting for the amounts due to others and the amounts due from others under the Agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by Part 241 of the Economic Regulations (Uniform Systems of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the Agreement as may be reasonably required by the Director of the Board's Bureau of Operating Rights; and

(e) Copies of all arbitrators' decisions and awards issued under this Agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the

arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

2. That except to the extent granted, the application and all other requests herein, be and they hereby are denied or dismissed.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Acting Secretary

(SEAL)

Opinion

INITIAL DECISION OF EXAMINER ARTHUR S. PRESENT

Preliminary Statement

This is another stage of the *Mutual Aid* case which has been before the Board intermittently since 1958. The original agreement among six trunkline air carriers providing for mutual aid in the event of a strike, effective for one year, was approved by the Board after receiving statements from interested persons and hearing oral argument.[1] The parties to the agreement later sought approval of its renewal, as amended, and approval was granted, after a full evidentiary hearing, for a period of three years.[2] The agreement was most recently approved in 1970, again after an evidentiary hearing.[3]

In the last-referenced order, the Board not only approved the agreement in its form at the time of the evidentiary hearing, but the Board also approved amendments to the agreement effective as of October 31, 1969,[4] after the hearing had closed and the Examiner's initial decision had been rendered. On reconsideration, the Board withdrew its approval of the 1969 amendments because they had not been exposed to the evidentiary hearing process.[5] The Board said:[6]

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[1] *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168 (1959), *reconsideration denied*, 30 C.A.B. 90 (1959).

[2] *Mutual Aid Pact Investigation*, 40 C.A.B. 559 (1964).

[3] *Airlines Mutual Aid Pact*, Order 70-7-114, July 23, 1970.

[4] Agreement CAB 21445.

[5] Order 70-11-110, November 23, 1970.

[6] *Id.* at 2.

Opinion

> We are not presently persuaded that our earlier determination was in error. However, in fairness to the parties and to ourselves, we believe that we should reserve making a final judgment in this important matter until we have before us a fully developed record on the current facts, with all parties afforded an opportunity to present their evidence and arguments and to be fairly judged on that evidence and these arguments. [Case cited] Accordingly, we will remand the matter for the taking of further evidence with respect to the amended agreement on events which occurred since the close of the earlier hearing.[4]

[4] *Inter alia* the Board desires evidence as to the agreement's role, if any, in affecting the bargaining balance between labor and management in the air transportation industry. In addition, in the event that we reach a different ultimate conclusion on the merits of the amended agreement, we will nevertheless give consideration to whether our action should be prospective only.

In December 1970, shortly after the issuance of the Board's order, the agreement was again amended, to permit local service carriers to become parties.

After the completion of preliminary steps and due notice, public hearing was held in November 1971. The parties to the proceeding are the applicants (the Trunkline Carrier Parties[7] and the Local Service Carrier Parties),[8]

[7] American Airlines, Inc.; Braniff Airways, Inc.; Continental Air Lines, Inc.; Eastern Air Lines, Inc.; National Airlines, Inc.; Northwest Airlines, Inc.; Pan American World Airways, Inc.; Trans World Airlines, Inc. (TWA); United Air Lines, Inc.; and Western Air Lines, Inc.

[8] Hughes Air Corp. d/b/a Air West; Frontier Airlines, Inc.; Mohawk Airlines, Inc.; North Central Airlines, Inc.; Ozark Air Lines, Inc.; Piedmont Aviation, Inc.; and Texas International Airlines, Inc.

the Six Union Parties,[9] the Air Line Pilots Association, International (ALPA), the Allied Pilots Association (APA), the Aircraft Mechanics Fraternal Association, Locals 24 and 32 (AMFA), Allegheny Airlines, Inc., the Department of Transportation, and the Board's Bureau of Operating Rights (Bureau). Briefs have been filed,[10] and the case stands ready for decision.

One procedural matter requires disposition. The Local Service Carrier Parties have filed a motion to strike an affidavit attached to the joint brief of APA and AMFA and argument in the brief thereon, specifically the third and fourth sentences on page 4, the second sentence of the first paragraph beginning on page 5, and the third full paragraph on page 7. They contend that the record is closed, that the affidavit can be received as evidence only if the record should be reopened, and that there are no valid grounds for taking such action. If the affidavit should be given evidentiary status, the Local Service Carrier Parties ask that the Examiner grant equal status to an affidavit attached to its motion.

The affidavit appended to the APA/AMFA brief is by the national director of AMFA and concerns the AMFA strike on Air West which began December 15, 1971. As pointed out by the Local Service Carrier Parties, the record is closed. No showing has been made that reopening the record to receive AMFA's affidavit is necessary or war-

[9] Air Line Dispatchers Association; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC); Communication Workers of America; Flight Engineers International Association (FEIA); International Association of Machinists and Aerospace Workers (IAM); and Transport Workers Union of America (TWU).

[10] Briefs were filed on behalf of all the parties except Allegheny and the Department of Transportation.

ranted to assure an adequate record or to meet the ends of justice. On the contrary, to bestow evidentiary status on the affidavit at this juncture would tend to impair the orderly conduct of the Board's business. Therefore, the motion to strike shall be granted.

Background

As has been indicated, the Board remanded this proceeding to take evidence on events which transpired since the close of the earlier hearing. Accordingly, the focus of this remanded proceeding has been on such events in relation to the October 1969 and December 1970 amendments. However, in order to gain perspective, it may be helpful briefly to review the history of mutual aid.[11]

Initial Agreement

The concept of mutual aid had been under consideration by the major carriers at least since 1957. It was engendered by dissatisfaction with the functioning of the Railway Labor Act.[12] The initial agreement was triggered by a strike on Capital Airlines, Inc., by IAM beginning October 17, 1958. The labor dispute also embraced other trunkline carriers. Capital appealed to other large carriers for financial assistance. A one-year agreement was reached among six carriers—American, Capital, Eastern, Pan American, TWA, and United—effective October 20, 1958. The objective of the agreement was stated in the preamble to be "to bring about sound and reasonable economic conditions that will be of benefit to the air transport industry

[11] The agreement in its present form is set forth in Appendix A.

[12] 45 U.S.C.A. 151 *et seq.*

and to the public" in the face of "extreme and unreasonable demands made by representatives of certain of the classes and crafts of their employees".[13] The mechanics devised to achieve this goal were "windfall" payments, that is competing carriers would return to the carrier on strike the increased revenues such carriers gained attributable to the strike less the added direct expenses of transporting the diverted passengers. It appears that the reasoning behind this approach contemplated minimizing the leverage which the striking employees might otherwise gain from the loss of revenues during the course of the strike by the strike-bound carrier.

The Board approved the agreement subject to certain conditions, announcing, " * * * the basic agreement cannot be found to be adverse to the public interest or in violation of the Act."[14] The Board explained, "In performing our statutory function, we may do no more than measure the agreement against these standards [the standards of section 412(b) of the Federal Aviation Act of 1958, as amended][15] in order to ascertain whether its effect would be so detrimental as to endanger achievement of the objectives laid down by section 102 of the Act. Within this framework, the Board's order follows from the lack of any affirmative showing that the agreement is adverse to the objectives specified by the Congress."[16]

Four additional carriers joined the agreement in 1960—National on March 11, Braniff on March 14, Northwest on

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[13] 29 C.A.B. at 190.

[14] *Id.* at 170.

[15] "The Board shall by order * * * approve any * * * agreement * * * that it does not find to be adverse to the public interest, or in violation of this Act; * * *."

[16] 29 C.A.B. at 177. Footnote omitted.

March 18, and Continental on April 4. However, National withdrew effective December 31, 1961. Capital, the carrier serving as the catalyst for the agreement was merged into United, effective June 1, 1971, the Board finding that Capital was a "failing business."[17]

During the period the terms of the initial agreement were in effect there were 15 strikes on mutual aid carriers lasting a total of 418 days,[18] or an average of approximately 28 days per struck carrier. A total of $16,160,000 passed among the carriers pursuant to the agreement.[19]

1962 Amendments

The parties to the agreement amended it and, as amended, sought Board approval for an indefinite period. Insofar as pertinent here, the principal amendments injected the "standard amount" as a means of supporting struck carriers. Thus in the event the "windfall" payments did not equal 25 percent of the normal air transport operating expenses of the flight operations shut down, "supplemental" payments would be made up to that level. The 25 percent level was considered reasonably related to the expenses which a carrier might be expected to incur during the period it was suffering a strike. The obligation to make "supplemental" payments is not related to any competitive financial benefit to the nonstruck carriers. However, the liability of each carrier in any one calendar year to make "supplemental" payments was limited to one-half of one

[17] United-Capital Merger Case, 33 C.A.B. 307 (1961), certificates reissued, 34 C.A.B. 725 (1961).

[18] Based on Appendix C to the Examiner's initial decision served March 7, 1969. Where, embraced within the same period of time, there was more than one group of employees on strike on a given airline, only one strike is counted.

[19] Appendix B.

percent of its air transport operating revenue for the previous calendar year.

The carrier parties advanced three principal reasons for adding "supplemental" payments to the agreement. They contended that the "windfall" payments, in most instances, were not sufficient to protect the carriers against the full brunt of union economic pressure. They also noted that several major competitive carriers were not parties to the agreement and their adherence appeared unlikely. Finally, alluding to the jurisdictional dispute between ALPA and FEIA then in progress, they alleged that several of the major transport unions did not exercise restraint in the use of their strike power and that this attitude was expected to continue.

The Board approved the amended agreement, stating:[20]

> * * *. Our examination of the record, compiled in an exhaustive and thorough investigation, leads us to the view that the Pact meets the tests of section 412 and that it is not adverse to the public interest objectives of the Act, but that on the other hand is consistent therewith.
>
> Air carriers are particularly vulnerable to strikes, and the industry has, in the recent past been plagued by strikes. The Pact offers, at a not unreasonable cost for the protection obtained, a substantial measure of relief against the costs of strikes, in this fashion and to this extent contributing to industry stability.

However, contrary to the request of the applicants, the Board limited its approval to three years because, "The years since creation of the Pact have not been typical either

[20] 40 C.A.B. at 561.

as to the industry, plagued with a capacity problem, or labor-management relations, preoccupied with the crew complement issue, and for this reason we shall limit approval to a period of 3 years."[21]

Continental withdrew from the agreement as of December 31, 1966.

The agreement contained the 25 percent "supplemental" payment provision from 1962 to October 1969. During this period there were 11 strikes against carriers party to the agreement.[22] These strikes involved a total of 292 strike days,[23] or an average of 27 days per struck carrier A total of $87,740,000 was paid and received under the agreement, of which total 22 percent comprised "supplemental" amounts.[24]

Previous Proceeding and Events Leading to Present Proceeding

Upon the expiration of the three-year term of approval, the carriers sought renewal of the approval for an indefinite period. The Hearing Examiner issued an initial decision granting the application.

Subsequent to that decision, in October 1969, the carriers amended the agreement, among other things, raising the "supplemental" payments level and making entry into the agreement easier and exit from it harder.

At first, the Board approved the agreement both in the form litigated before the Examiner and as later amended.[25] The Board basically adopted the Examiner's findings

[21] *Id.* at 563. Footnote omitted.

[22] This excludes a five hour strike against Northwest in June 1969.

[23] Appendix C to March 7, 1969, initial decision and Appendix C hereto.

[24] Appendix D.

[25] Order 70-7-114, *supra.*

that the agreement was consistent with national labor policy, contributed to airline stability, had had little, if any, impact on labor-management relations, and had not been shown materially to affect the collective bargaining process. The Board also held that, although the amendments to the agreement strengthened it, they did not change the basic nature of the agreement or add any element that rendered it adverse to the public interest.

On reconsideration,[26] for reasons described earlier herein, the Board vacated its order, to the extent the order approved the agreement, as amended, and remanded the proceeding to the Examiner.

In December 1970, the agreement was further amended to permit participation by local service carriers on the same terms as the trunkline carriers.

As a consequence of the amendments regarding entry into the agreement, Continental and National rejoined effective November 15, 1969, and Western became a member as of August 3, 1970. Delta Air Lines, Inc., and Northeast Airlines, Inc., are the only trunkline carriers not parties to the agreement.

The local service carrier amendments brought Air West, Frontier, Mohawk North Central, Ozark, and Piedmont into the agreement as of January 1, 1971. Texas International joined effective October 5, 1971. The only local service carriers not adhering to the agreement are Allegheny and Southern Airways, Inc.

Two groups of amendments are the center of inquiry, the October 1969 and the December 1970 amendments.

The October 1969 amendments contain five principal features. First, the "standard amount" of payments is increased from 25 percent to a range of 35 to 50 percent of

[26] Order 70-11-110, *supra*.

the struck carrier's normal air transport operating expenses, in decreasing ratio as the length of the strike grows.[27] Second, the annual maximum liability of every party to the agreement is enlarged from one-half percent to one percent of its air transport operating revenue for the previous calendar year. Third, the conditions for entry into the agreement were modified to permit any trunkline carrier to become a party by November 15, 1969, without a waiting period or back payment. Fourth, the provisions for withdrawal from the agreement were amended so that the time period for notice of withdrawal was lengthened from 60 days to one year. Fifth, the arbitration clause was extended to subject the amounts of payments to arbitration in the event of a dispute. Previously, only disputes over the requirement to make or the right to receive payment was subject to arbitration.

The December 1970 amendments opened participation in the agreement to local service carriers on the same terms as the Trunkline Carrier Parties. The amendments, as originally executed, did not cover existing strikes. But, upon the request of Mohawk, the amendment was altered so that Mohawk would receive mutual aid beginning January 1, 1971, with respect to the strike it had been suffering since November 12, 1970. The Trunkline Carrier Parties acceded to the change because they considered Mohawk to be in the same position held by Capital when the agreement was initially made.

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[27] The "standard amount" is equal to the following percentages: (a) during the first 14 days following commencement of the strike, 50 percent of the struck carrier's normal air transport operating expenses; (b) during the next seven days, 45 percent; (c) during the following seven days, 40 percent; and (d) during any subsequent period, 35 percent.

Opinion

As explained by the Trunkline Carrier Parties in their brief, the increase in payment levels had two purposes. The first was to improve the protection afforded struck carriers in view of (1) the growing losses suffered by struck carriers at the 25 percent level, and (2) the deterioration of the carriers' ability to withstand losses. The second purpose was to strengthen the carriers' credibility in labor negotiations in the hope that there might be some tempering of union demands and thus some alleviation of the trend toward ever more costly and inflationary settlements. The annual maximum liability for supplemental payments was raised to finance the higher payment levels. The Trunkline Carrier Parties assert that the adherence clauses of the agreement were changed because, by broadening the membership, the "windfall" aspects of the agreement would be strengthened and reliance on "supplemental" payments would be reduced. In addition, the parties to the agreement believed carriers not parties to the agreement were in a position of special vulnerability to demands for even higher settlement levels which would impair their viability and result in destructive precedents for the parties to the agreement. The changes to the withdrawal provisions emphasized the long-run commitments of parties to the agreement. The Trunkline Carrier Parties state that arbitration terms were altered because there seemed no good reason not to provide for arbitration of questions concerning the amount of payments as well as the right to receive payments.

The Trunkline Carrier Parties note that the Board's decision of July 1970 had an influence on their decision to allow local service carriers to join the agreement. Mohawk and North Central had asked the Board to withhold approval of the agreement until steps were taken to assure

participation by the local service carriers. The Board denied the request "without prejudice to any future agreement of this nature which may be filed."[28] Furthermore, in a concurring statement, Chairman Browne declared, "Mohawk and North Central are free to bring the issue before the Board at a later time if the trunkline carriers fail to afford them the proper consideration." The Trunkline Carrier Parties state that they desire to have the local service carriers participate in the agreement for the same reasons they want the agreement and they think further broadening the coverage should make the agreement more effective. The Local Service Carrier Parties claim they have fully as great a need as the Trunkline Carrier Parties for the protection against strike losses afforded by the agreement.

Since the October 1969 amendments became effective, there have been four strikes affecting members of the agreement.[29] There was a 116-day strike conducted by the Air Line Employees Association (ALEA) against National from January 31, 1970; a 160-day strike by BRAC against Northwest from July 8 to December 14, 1970; a two-day strike by the Air Line Stewards and Stewardesses Association against TWA from October 19 to October 21, 1970; and 154-day strike by ALPA against Mohawk from November 12, 1970, to April 14, 1971. With respect to the last-mentioned strike, 50 days occurred prior to Mohawk's entry into the agreement and 104 days thereafter. The four strikes involved 382 strike days while the struck carriers were members of the agreement, an average of 95 days per struck carrier. Mutual aid receipts and payments totaled $83,585,000[30] of which 59 percent constituted "supplemental" payments.

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[28] Order 70-7-114, Opinion, p. 16.

[29] This does not count the strike called by AMFA against Air West beginning on December 15, 1971, after the hearing ended.

[30] Appendix E.

Positions of Parties

Approval of the agreement, as amended in 1969 and 1970, is supported by the Trunkline Carrier Parties, the Local Service Carrier Parties, and the Bureau. The carriers request approval for an indefinite period with no conditions attached other than those imposed with regard to the preceding agreement. The Bureau recommends that the Board's approval be limited to five years.

All the unions oppose both the 1969 and 1970 amendments and ask for disapproval of the amended agreement. The Six Union Parties expressly request that the disapproval be retroactive. Even if the October 1969 amendments should be approved, the Six Union Parties maintain that participation by local service carriers should be excluded.

Discussion

The history of the mutual aid agreement reflects a constant search for elusive and perhaps unattainable goals. The carriers participating in the mutual aid agreement have sought to shore up their financial positions in relation to union strike activity and to cause the airline unions to moderate their demands. The escalation of mutual aid protection over the years signifies that the carriers believe they have gained their objectives only in part, at best.

Board approval in the past has rested fundamentally on the principle that mutual aid is a legitimate means of self-help in accordance with our nation's labor policy and on the lack of any showing that the agreement was detrimental to the policy objectives of the Act set forth in section 102. In addition, the Board found that the agreement enhanced airline stability and, therefore, was consistent with the aims of the Act.

Opinion

Whatever the earlier accomplishments of mutual aid may have been, the 1969 and 1970 amendments have shifted the balance away from favoring approval of the agreement as it now stands. Thus, the present level of benefits creates a real possibility of a party to the agreement, particularly a weak airline, prolonging a strike for short-term benefits, to the detriment of the traveling and shipping public. Moreover, such level heightens the danger that airlines contributing to the struck carrier may be significantly weakened and thereby impair their public service obligations.

Accordingly, after careful consideration of the evidence of record and the contentions of the parties, the Examiner is persuaded that the amended agreement should be disapproved to the extent the "standard amount" exceeds 25 percent and a contributing carrier's liability in relation to the "standard amount" could be greater than one-half of one percent of its prior year's air transport operating revenues. In addition, local service participation should be eliminated. Finally, the agreement should be amended so that the decision herein would operate prospectively and not apply to mutual aid receipts and payments occurring prior to the effective date of this decision.

Amount of Strike Losses Covered by Agreement

The evidence discloses that the agreement prior to the October 1969 amendments was accomplishing one of its goals; it was adequately covering losses suffered by a carrier during the course of a strike. For example, American was struck by TWU during the period February 27 to March 19, 1969. Taking into account mutual aid, American incurred an estimated loss of $5.6 million before income taxes. Since depreciation and amortization made up $5.3

million of its expenses,[31] the carrier's cash loss was in the neighborhood of $300,000. The $20,311,000 received by American in mutual aid was comprised completely of "windfall" payments. With no resort to "supplemental" payments, mutual aid covered 82 percent of American's operating expenses including depreciation and amortization. Pan American was struck by the International Brotherhood of Teamsters (IBT) from August 9 to 12, 1969. In this situation, as a result of mutual aid receipts amounting to $1,682,000, and although it incurred approximately 56 percent of its estimated normal operating expenses during the strike period, the carrier had an estimated net profit before income taxes of $619,000 after charging $1.1 million of depreciation and amortization to expenses.

The carriers maintain, however, that the losses suffered during the course of a strike are only a portion of the losses incurred by a struck carrier. They assert that before the strike and particularly after the strike has been settled the struck carrier continues to acquire losses[32] because of such factors as start-up costs and diversion of passengers to other carriers. In relation to the TWU strike against American, it is estimated that the post-strike losses for the period March 21 to April 30, 1969, were $11.4 million.[33]

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[31] ALPA contends that the carriers should not be charging depreciation and amortization to expenses when they are not operating. It is unnecessary to pass on ALPA's contention.

[32] By losses it is meant that the post-strike financial results are less satisfactory than would have been the case if there had not been a strike.

[33] It might be noted, however, that in 1969, despite the strike, American realized a net income after special items of $38,468,000, some $3 million higher than in 1968, a year in which no party to the agreement endured a strike.

The estimate is that Pan American lost $2.1 million for the period of August 1969 after operations were resumed.[34] In the cases of National and Northwest, the carriers estimate that, at the 25 percent level, only 40 percent of National's and one-third of Northwest's strike and post-strike losses would have been covered. They maintain that, in the case of the 43-day strike by IAM in 1966 against Eastern, National (not a pact carrier at the time), Northwest, TWA, and United, the "supplemental" payment fund was exhausted almost immediately and the struck carriers recovered only between 14.7 percent and 30.7 percent of their strike losses.

There is no denying that the higher level of benefits bolsters a struck carrier, but the Trunkline Carrier Parties have made no showing that an increase in mutual aid benefits was required to maintain the stability of any of the carriers involved in these strikes. Certainly, the record does not indicate that the 1966 experience established a need for a higher level of payments. As shown in Appendix F, the carriers struck by IAM realized rates of return on investment in 1966 ranging from 7.30 percent by Eastern to 21.88 percent by Northwest. National, which did not belong to the mutual aid agreement at the time, enjoyed a

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[34] The Trunkline Carrier Parties assert that no significant questions were raised at the hearing concerning the procedure followed in determining post-strike losses and the reliability of the carrier strike loss exhibits is not subject to challenge. There can be little doubt that a strike produces an adverse post-strike impact on a carrier, but there is no need to evaluate the validity of the carriers' post-strike loss projections. However, if there were any merit in the claim of the Trunkline Carrier Parties that Northwest's own computation shows only a "paper profit" during the course of the strike (brief, p. 30, second footnote), when that computation is based on actual experience, it would raise a substantial question as to the description and weight, if any, to be accorded the carriers' estimates of post-strike losses, since such estimates reflect a hypothetical situation.

rate of return on investment of 15.87 percent. Indeed, it was not until a meeting among pact members held on August 7, 1969, that the proposal was made to raise the "standard amount". The record is silent as to the events which prompted this meeting, but the meeting was held during the course of the IBT strike on Western (not then a pact member) and just two days prior to the IBT strike against Pan American.

It is evident that in increasing the "standard amount" the Trunkline Carrier Parties have expanded their goal from merely covering strike period losses to meeting, to some extent, post-strike losses as well. The evidence indicates that during a full shutdown a struck carrier can limit its operating expenses to 29.2 percent of the normal level. Under the current agreement, the lowest limit covered is 35 percent and that rate is not reached until the fifth week of the strike. The witness for the Trunkline Carrier Parties who explained the purpose of the amendments testified that in deciding upon the increase the carriers retained the method of calculating mutual aid on the basis of the strike period but were trying to compensate to some degree for the total costs of the strike. The actual financial results during four strikes on carrier parties to the agreement since the October 1969 amendments are consistent with this evidence.

National, although it conducted no operations during the approximately four-month strike by ALEA, with the aid of mutual aid receipts amounting to $27,985,000, earned, during the strike period, net income of $810,000 after $8.4 million in charges for depreciation and amortization.

Northwest, which during the five-month strike by BRAC conducted an average of about 29 percent of its operations,

achieved a net profit before income taxes of $17.9 million during the strike period after deducting $32.8 million in charges for depreciation and amortization. The carrier's mutual aid receipts totaled $47,287,000.

TWA incurred a net loss before income taxes of $879,000 during the two-day strike to which it was subjected in October 1970. That result reflects charges for depreciation and amortization in the amount of $621,000 and mutual aid receipts of $2,452,000. The carrier maintained about 25 percent of its operations during the two days. However, TWA estimated that, if it had not suffered the strike, it would have lost $1,687,000 during the two-day strike period, so that the carrier actually gained $808,000 for the period of the strike.

Mohawk received mutual aid for the first quarter of 1971. It conducted no operations during the strike and received no subsidy for that period. Yet, it had a net profit of $29,000 for this quarter after taking into account $1.8 million in depreciation and amortization and $1.4 million in nonoperating expenses.[35]

Impact of Increased Mutual Aid on Union Demands

The October 1969 amendments have made greater financial support available for struck carriers. However, the other part of the dual objective has not been achieved, that is, the unions have not moderated their demands (at least not significantly) as a consequence of the increased mutual aid. The record is replete with evidence demonstrating the failure of mutual aid in this regard.

The chief labor relations official of National from 1948 through June 30, 1971, testified, with respect to the 1970

[35] This calculation is predicated on mutual aid receipts of $6,170,000 per Exhibit MO-6, p. 3. However, mutual aid payments to Mohawk appear to have totaled only $5,861,000. See Appendix E.

ALEA strike, that the carrier regarded the demands of the union very excessive and the union conduct during the course of the strike as counterproductive. He said that National would have taken the strike even if the carrier were not a party to the mutual aid agreement. Furthermore, he testified that National's membership in the pact did not affect the substance of the settlement made with ALEA. As set forth in the following testimony, this official was astonished at the fortitude of the employees during the course of the strike:[36]

> Q. Mr. Rosenthal, if you know, and it will appear to be a related question, but it is slightly different, what in your opinion enabled ALEA in their position or in your experience, enables other unions to hold out for so long during a work stoppage?
>
> * * * * *
>
> A. In the ALEA dispute, it was a matter of amazement to me. I don't know how they were able to hold out. They did not get strike relief, and yet they did hold out.

In spite of the assistance of mutual aid, this witness characterized the settlement with ALEA as "reasonable-plus", meaning "a settlement which may have been a little less than that would have fallen in the category of reasonableness."[37]

Similarly, Northwest's vice president-personnel, commenting about the BRAC strike, said:[38]

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[36] Tr. 219-220.

[37] Tr. 200.

[38] Trunkline Carrier Exhibit No. 23, p. 12.

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> Although the Mutual Aid Agreement provided vital financial protection to Northwest during this long and devastating strike, it had nothing whatsoever to do with the existence or duration of the strike, and it played no part in negotiations before or during the strike.

Accenting this statement, the official testified that Northwest considered the BRAC demands so unreasonable the carrier's position probably would have been the same even in the absence of any mutual aid.

Speaking on behalf of Eastern, in response to a question regarding the effectiveness of the increased payments provided under the October 1969 amendments, a witness said:[39]

> Well, it obviously has not been very effective, because the settlements are still inflationary, the most reasonable ones we have.
>
> But what I do say is that we are an extremely vulnerable industry and unless we can strengthen the hand of the carrier in negotiations, you will have even more inflationary settlements than we have had.

It is also significant that the National, Northwest, and Mohawk strikes were three of the longest strikes in the airline industry. Indeed, the strike against Northwest was the longest strike against a party to the mutual aid agreement, that against Mohawk was the second longest, and the strike against National the fourth longest, exceeded only by a 137-day strike by IAM against Northwest from October 11, 1960, to February 24, 1961.

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[39] Tr. 143.

The Trunkline Carrier Parties even concede in their brief that the increased level of payments has been ineffective in inducing the unions to moderate their demands. They said,[40] "Recent settlement levels and the circumstances of the strikes described in the record dispel any notion that the unions will moderate their demands to conform to reduced carrier ability to pay." They commented further:[41]

> *** ALPA Exhibit 20 shows greater increases in employee compensation since Mutual Aid than before and dramatically greater increases since the 1969 Amendments. Moreover, updated versions of exhibits introduced at the earlier hearing show that airline employees not only continue to lead employees in all other major domestic industries in average hourly wages, but have increased their margin in both absolute and percentage terms.

Nevertheless, the Trunkline Carrier Parties argue that these experiences do not prove that the increased level of payments is without impact on the bargaining process. They contend that the National and Northwest strikes were controlled by the supervening influence of inter-union rivalry. Furthermore, they claim that the unions are likely to increase their demands when they conclude that a hard-pressed carrier is in no position to resist them. The Trunkline Carrier Parties aver that settlements since the 1969 amendments, generally involving lucrative increases in compensation, were made at a time of inflationary settlements throughout the economy, and they speculate that the settlements might have been even higher in the absence of

[40] Brief, p. 32.

[41] Brief, pp. 37-38.

the amendments. They furthur conjecture that the tempering effect on union demands caused by improvement in the airlines bargaining credibility is likely to be felt over the long run.

It is apparent that the arguments of the Trunkline Carrier Parties on the moderating effect of increased mutual aid do not rest on the long experience under the mutual aid agreement but on pure surmise. In the light of the objective evidence, their contentions cannot be accepted.

There can be little doubt that inter-union rivalry presently affects carrier-labor relations particularly with respect to ground employees. But the record shows that inter-union rivalry is not a new feature in carrier-labor relations. As the Trunkline Carrier Parties themselves point out, the ALPA-FEIA controversy lasting from 1958 to 1962 was an aspect of that contest. Furthermore, with or without increased mutual aid, the carriers will continue to be confronted with the problem of inter-union factionalism in the future.

The carriers have pointed to the Western-IBT strike in 1969 and the settlement thereof as an example of the use of a settlement on a carrier in poor financial condition as leverage for an even larger settlement in bargaining with other carriers. However, Western is by no measure a weak carrier. Rather, the data show that it ranks among the more profitable carriers and that it is having a satisfactory recovery from the economic recession which hit the industry in the past few years.[42] Moreover, even more

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[42] See Appendix F. The Examiner in the *American-Western Merger Case* said, "[Western's] financial status is far removed from comparison with the distress situations that have previously come before the Board in merger cases. On the contrary, whether viewed in the absolute or in relation to the other domestic carriers, it would

pertinent, is Western's experience after it joined the mutual aid agreement. Western adhered to the agreement because the carrier felt that without the support of mutual aid it was too vulnerable to strikes and excessive union demands. The carrier considered the increases it granted as a result of the IBT strike inordinate and as setting an adverse industry precedent. Nevertheless, on March 23, 1971, after it was a full-fledged pact member, Western signed an agreement with ALPA[43] which the Western witness described as "very highly favorable [for the pilots]. It is an inflationary settlement, very inflationary, which involves not only costs, direct costs, but loss of productivity."[44]

The Trunkline Carrier Parties urge that the Mohawk strike illustrates that unions are more likely to increase their demands where they conclude that a hard-pressed carrier is in no position to resist them. There is no probative evidence that ALPA's demands took into account Mohawk's financial condition. Nor does the contention of the Trunkline Carrier Parties square with such evidence as is available.

For example, analysis of rates paid as of December 31, 1971, pursuant to IAM agreements with Braniff, Continental, Eastern, National, Northeast, Northwest, TWA, and United does not demonstrate that Northeast, the weakest trunkline carrier, is a bellwether for union settlements.[45] In the category of lead inspector (only Northeast, North-

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have to be adjudged a very healthy company. While it had some basis for a less than rosy outlook in the months preceding the active negotiations with American it is now quite apparent any basis for concern was short lived." Recommended Decision, p. 35.

[43] There was no strike.

[44] Tr. 348.

[45] Northeast has not incurred a strike since 1958.

west, and TWA have that category), Northeast pays the highest rate, $6.20 per hour, and TWA the lowest, $6.12 per hour. But in the category of inspector, a classification on all eight carriers, Northwest pays the highest rate, $6.00 per hour, and Northeast the lowest, $5.87 per hour. In the mechanic-lead or crew chief group, of the eight carriers, Northeast pays the second lowest rate, $5.87 per hour. The highest rate is paid by National, Northwest, TWA, and United, $5.97 per hour. In the category called mechanic, Northeast and Eastern pay the lowest rate, $5.09 per hour, with National, TWA, and United paying the highest rate, $5.18 per hour.

It should not be overlooked that the longest strike against a mutual aid agreement member—the 160-day strike by BRAC against Northwest—occurred after the October 1969 amendments and was suffered by the carrier most relatively profitable of all the pact members.[46] And the 116-day strike incurred by National was called against another very profitable member.

At any rate, whatever the nature of the problems presented by carrier-union labor relations may be, the dilemma has not been circumvented through increased mutual aid.

Dangers of Increased Mutual Aid

Section 412(b) of the Act requires the Board to disapprove any agreement which the Board finds to be adverse to the public interest or in violation of the Act. In evaluating the public interest, the Board must consider, among other things, the factors set forth in section 102 of the Act. That section contains the congressional policy of promoting, encouraging, and developing our nation's air transportation system.

[46] Appendix F.

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Up to this point, the discussion would not warrant disapproving the higher level of mutual aid. The increased level of mutual aid support for struck carriers helps buttress such carriers' financial stability and thereby contributes to the developmental purposes of the Act. The fact that such aid has not been effective in inducing unions to moderate their demands may be disappointing but that circumstance alone does not undercut mutual aid as a legitimate means of self-help under our national labor policies. However, a closer examination of the record in light of the Board's statutory obligations discloses that the increased level of mutual aid creates certain perils which may undermine the objectives of the Act. These risks are so serious as to justify disapproving the increased level of payments.

Potential Danger of Longer Strikes

The record indicates that mutual aid, even after the October 1969 amendments, has not been a significant factor in either a carrier's decision to suffer a strike, or during the course of a strike, its determination when to settle.[47] This situation prevails because mutual aid has been ineffective in achieving the goal of persuading unions to moderate their demands.

Nonetheless, the significant consideration is that the increased mutual aid is intended to encourage a carrier to incur a strike and to withstand union pressures during the course of a strike in order to avoid surrendering to what the carriers believe are unreasonable demands. As the Trunkline Carrier Parties' witness explaining the

[47] However, Mohawk's chief executive officer at the time of the strike conjectured that without mutual aid the carrier might have settled or elected the merger route sooner. There is no indication that the higher level of mutual aid flowing from the October 1969 amendments had any bearing on this testimony.

amendments said, "We also had in mind the necessity of increasing the amount of financial protection provided to a struck carrier so that it would be in a position realistically to resist unreasonable demands made under threat of a strike."[48]

Of course, no carrier is likely to protract a strike indefinitely because of the current level of mutual aid which is available. There are too many pressures[49] on a carrier to produce such a result.

But, in the short-run, a carrier can utilize the higher level of increased payments as a consideration in determining when it is opportune to settle a strike. One of the Trunkline Carrier Parties' witnesses testified that when a carrier commences operations after a strike it is largely a matter of the carrier's managerial judgment how rapidly it will return to full operations. An important circumstance in reaching this decision is the season of the year. This witness also stated that the carriers realize the availability of "windfall" payments during the post-strike period might affect a carrier's judgment regarding which flights it should resume first and constitutes one of the reasons the carriers have so far rejected direct mutual aid for that period.

These types of considerations are present during the course of a strike, and it is not far-fetched to conclude that, with the higher level of "supplemental" benefits now available, could influence management's judgment as to when it is timely to settle a strike. It was earlier noted that

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[48] Trunkline Carrier Exhibit No. 20, p. 5.

[49] Among these pressures are the adverse impact of a prolonged strike on the going concern capacities of the carrier, the increase in post-strike losses as the strike becomes more lengthy, and the urgings of governmental authorities, the traveling and shipping public, and nonstriking employees.

TWA was financially better off during the two-day strike it incurred in 1970 than if it had fully operated on those days. The really dramatic picture is shown when a weak carrier is involved. Thus, for the quarter ended March 31, 1971, the period for which Mohawk received mutual aid,[50] without any operations or subsidy the carrier enjoyed an operating profit of $1,445,000 and a net income after special items of $29,000.[51] In contrast, for the three months ended March 31, 1969, on the basis of its Form 41 reports, the carrier realized from its operations (including $592,000 in subsidy) an operating profit of only $890,000. Furthermore, after special items it suffered a net loss of $421,000.[52]

It is evident, therefore, that the higher level of mutual aid payments may sway a carrier's decision as to when it should settle a strike, to the detriment of the public utilizing air transportation.

Adverse Impact on Paying Carriers

The carriers complain that the unions, in formulating their demands, pay no heed to the financial condition of the carrier with which they are bargaining. The mutal aid

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[50] "Supplemental" payments comprised 93 percent of the total.

[51] The allegation of the Trunkline Carrier Parties and of the Local Service Carrier Parties that the continuation of the Mohawk strike after the carrier became a party to the mutual aid agreement cannot be attributed to mutual aid but rather stemmed from ALPA's refusal to compromise its demands further reflects the ineffectiveness of the increased level of mutual aid payments as a force influencing the unions to moderate their demands.

[52] Data for the first quarter of 1970 were not utilized for comparison purposes because Mohawk's operations were adversely affected by the controller sick-out in late March. For that quarter, Mohawk had an operating loss of $1,158,000 (after taking into account $470,000 in subsidy) and a net loss after special items of $2,570,000. It is noteworthy, nevertheless, how much better off Mohawk was when it suffered the strike

agreement has the same kind of defect. It does not take into account the financial conditions of the receiving and contributing carriers. The record indicates no important attention was paid to this factor when the increased level of payments was discussed. Indeed, none of the carrier witnesses participated in studies of the financial impact of the increased level of payments or saw any studies on this subject.

The principal beneficiary of mutual aid in 1970 was Northwest, relatively the most profitable of the parties to the mutual aid agreement. In fact, although it conducted heavily reduced operations during five months of the year because of the strike by BRAC, mutual aid enabled Northwest to attain the highest rate of return on investment of any of the carriers belonging to the agreement.[53] Moreover, with the additional assistance of the income tax laws, Northwest actually enjoyed a greater net income after special items in 1970 than it achieved in 1969. Nor would Northwest have been deprived of a net profit for the year if the 25 percent "standard amount" level had still been in effect. On the other hand, National, the carrier with the worst 1970 rate of return on investment of the pact carriers, a negative figure, and which itself received mutual aid of $27,985,000, 52 percent of which were in "windfall" payments, was required to pay to Northwest, $1,246,000, all of which were "supplemental" payments. Similarly, TWA received $2,452,000 in mutual aid in 1970, 67 percent of which constituted "windfall" amounts. Next to National, it had the worst return on investment, also a negative figure. But it had to pay a total of $8,399,000 to National and Northwest, of which some 85 percent comprised "supplemental" payments. In these circumstances, the contention of the Trunk-

[53] Appendix F.

line Carrier Parties that the carriers were able to make the payments called for by the agreement without impairment of their financial condition is hollow.

A review of mutual aid data over the life of the agreement again shows that the greatest recipients have been among the relatively more profitable members. Thus, the recipient of the largest amount of mutual aid has by far been Northwest, which has had net receipts of $49,871,000.[54] Yet, in eight of the ten years from 1961 through 1970, Northwest had the highest rate of return on investment of any of the present trunkline pact members.[55] National was the next highest recipient of pact aid, a net of $26,185,000. But, over the period 1961 through 1970, it had the highest rate of return on investment in one year, the second highest in four years, and in only two years was not among the top half of the present group of trunkline members of the pact.

On the other hand, the highest contributor under the agreement has been United, with net payments in the amount of $28,223,000. United has been in the top half of the ten present trunkline members of the pact only once in terms of rate of return on investment during the ten-year period reviewed. That was in 1969 when the carrier reached fifth place. The carrier's rate of return on investment over this period did not exceed 9.82 percent and was as low as 0.59 percent.[56] Other evidence of the adverse effect on

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[54] Appendix G.

[55] Appendix F.

[56] In General Passenger-Fare Investigation, 32 C.A.B. 291, 308-309 (1960), the Board found reasonable an overall rate of return on investment of 10.25 percent for the Big Four carriers. Recently, in Domestic Passenger-Fare Investigation, Phase 8—Rate of Return, Order 71-4-58, April 9, 1971, Opinion, p. 32, reconsideration denied, Order 71-7-43, July 8, 1971, the Board found the reasonable rate of return for domestic trunkline passenger services to be 12 percent.

United of mutual aid is reflected in the carrier's working capital. As of December 31, 1968, United's working capital amounted to $45,994,000. At December 31, 1970, the carrier's working capital totaled $17,520,000. The carrier estimated that if there were no mutual aid agreement its working capital would have been $47,225,000 at December 31, 1970. The next highest payer of mutual aid has been Pan American, in the net amount of $21,846,000. Pan American has been in the top half of the pact members, in terms of rate of return on investment, four times in the ten-year period, but since 1963, it has reached the top half only once, fifth place in 1967. The carrier had a negative rate of return on investment in 1969 and a return of only 0.51 percent in 1970.[57]

The defect in the mutual aid agreement of ignoring the financial conditions of the contributing carriers has been intensified by the increased emphasis on "supplemental" payments. Clearly, broadening the pact membership has not overcome the problem. It is significant that of the $187,485,000 changing hands under the agreement since its inception and through June 1971, 45 percent is attributable to the four strikes since the October 1969 amendments. The extraordinary shift in balance toward "supplemental" payments was pointed out earlier. In fact, 27 percent of the total of mutual aid payments since the beginning of the pact is reflected in the $49,688,000 in "supplemental" payments made in connection with these four strikes. Whatever equity there may be in competing carriers surrendering the profits from additional gains because of a strike on a brother airline does not extend to "supplemental" pay-

[57] Nevertheless, in the latter year, Pan American paid out $9,404,000 under the mutual aid agreement, 76 percent of which was in "supplemental" payments.

ments which are imposed regardless of the competitive relationship between the struck carrier and the other members of the agreement.

With respect to the hardship on contributing carriers of the obligations of the mutual aid agreement, it is pertinent that the one percent limitation is not a true ceiling on payments because of the "windfall" payments. For example, while the $5,894,000 in "supplemental" payments made by Eastern in 1970 are clearly within the one percent standard, counting "windfall" payments, the carrier paid out $19,319,000, or somewhat in excess of two percent of its 1969 air transport operating revenue.[58] Moreover, since the one percent limitation was not reached in 1970, if the strike situation should become worse, the impact on the contributing carriers would be even greater.

The record does not establish that any carrier has incurred or prolonged a strike because of the increased level of mutual aid. Nor does it demonstrate that the viability of any carrier has been critically threatened because of the higher level of contributions required under the amended agreement. But the dangers are apparent and outweigh the benefits that may be obtained by struck carriers from the additional financial support afforded by the augmented level of mutual aid.[59]

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[58] Appendix H. The total payments of Continental, United, and Western also exceeded one percent of the individual carrier's 1969 adjusted transport operating revenue. It might further be noted that Western's membership in the agreement did not become effective until August 3, 1970, so that the carrier made no payments to National and no payments for the first 25 days of the IBAC strike against Northwest.

[59] Also weighing against a current need for increased mutual aid as a tool for persuading the unions to temper their requests is the fact that wage-price guidelines are currently in effect and increases in wages and prices are subject to Governmental approval.

Local Service Carrier Amendments

Once before the Board entertained the question of whether the local service carriers should be permitted to participate in mutual aid. The Board disapproved the mutual aid agreement as adverse to the public interest because it found there was a substantial prospect that the local service carrier's subsidy requirement would be increased through its participation in the agreement.[60] The Board stated that its findings and conclusions were without prejudice to the submission of a revised agreement containing provisions assuring against any possible subsidy burden on the local service carrier.

The Local Service Carrier Parties claim the condition which the Board laid down in the *American-Mohawk* case is met under present circumstances. Thus, under the most recently effective class rate formula[61] a local service carrier's subsidy would be unaffected by either mutual aid payments or mutual aid receipts. In addition, it is contended that local service carriers stand to gain considerably more in the way of financial benefits under the agreement than they would be called upon to pay out because of the operation of the "windfall" provisions of the agreement.

It is true that under the most recent versions of the class rate formula, so long as a local service carrier remains on a closed rate, its subsidy is untouched by mutual aid receipts or payments. Nevertheless, adherence to the mutual aid agreement hardly seems consistent with the statutory scheme particularly as reflected in section 406 of the Act.

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[60] Mutual Aid Agreement between American Airlines, Inc., and Mohawk Airlines, Inc., Order E-24213, September 23, 1966.

[61] Investigation of the Local Service Class Subsidy Rate, Order 71-3-7, March 1, 1971.

For example, as in the case of Mohawk, the class rate formula provides no funds for a carrier which does not operate, even if the suspension of operations is caused by a strike. If some service were conducted, subsidy would be available to sustain the operations which were performed. Yet, under the mutual aid agreement, payments are made for operations which are shut down and not entitled to subsidy support. Thus, the other local service carrier parties to the agreement made payments to Mohawk from their working capital, which included subsidy receipts, although under the class rate formula that carrier was not authorized direct subsidy from the Government. If a trunkline carrier were on strike, while none of those carriers presently receive subsidy, through the payments of the Local Service Carrier Parties the trunkline carriers would be securing a measure of subsidy help.

If a local service carrier should be on an open rate when it suffers a strike, it has recourse to the subsidy provisions of the Act.[62] The Board must determine the carrier's need in light of the developmental purposes of the Act under the statutory standards of honest, economical, and efficient management.[63] To the extent the criteria are met, strike losses are underwritten.[64] Therefore, mutual aid would be unnecessary. With regard to strike losses which the Board finds are not allowable under the statutory standards, it would be incongruous for such losses to be alleviated by

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[62] Section 406.

[63] American Overseas Airlines v. Civil Aeronautics Board, 254 F. 2d 744 (D.C. Cir. 1958).

[64] Transatlantic Final Mail Rate Case, Reopened, 42 C.A.B. 195 (1965), *aff'd., sub nom.*, Trans World Airlines v. Civil Aeronautics Board, 385 F. 2d 648 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 944 (1968).

other, subsidized carriers.[65] Accordingly, from a conceptual viewpoint, the extent of the exposure of the local service carriers under the agreement is immaterial.

Nevertheless, the Local Service Carrier Parties argue that the cost of belonging to the pact is reasonable. They contend that the maximum amount payable in one year would range among the participating local service carriers from about $500,000 to around $750,000.[66] As previously indicated, such a contention does not take into account the effect of "windfall" payments. Moreover, this contention overlooks the impact on individual carriers. As an example, the local service carrier party to the agreement subject to the maximum exposure is Frontier, a carrier which has never undergone a strike. The exposure of about $750,000 is significantly greater than the carrier's operating profits in 1969 and 1970.[67] The Board has lately permitted Frontier to suspend service over major routes because among other things, the carrier's financial condition is "so serious."[68] Adherence to the pact, therefore, reflects not only a substantial gamble on Frontier's part but also, if the Board

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[65] In the one case directly dealing with the matter, the Board disallowed payments made under the mutual aid agreement by a subsidized carrier in determining that carrier's mail pay need. Pan American Mail-Rate Case, Reopened, 35 C.A.B. 540, 555 (1962).

[66] These amounts would be reduced in half under the provisions of the agreement in effect prior to October 31, 1969.

[67] In 1969 and 1970, Frontier had operating profits of $479,000 and $415,000, respectively, and in 1968 it suffered an operating loss of $1,921,000.

[68] Frontier Airlines, Inc., Suspension Applications, Order 72-1-100, January 28, 1972, p. 7. This example also mirrors the chief flaw in the agreement, the absence of consideration of the financial conditions of the paying carriers. Frontier paid Mohawk $50,000 in 1971 pursuant to the mutual aid agreement, all of which constituted "supplemental" payments. This amount is larger than the payment of any other local service carrier.

were to ratify Frontier's participation, a similar speculation by the Board.

The Local Service Carrier Parties urge, however, that as a group they stand to gain much more in the way of benefits than they may assume in obligations. If the Mohawk situation should be representative, this claim is valid. Of the $5,861,000 in mutual aid received by Mohawk, $5,626,000, or 96 percent, was paid by the trunkline carrier members of the agreement. Moreover, the trunkline carriers supplied the entire amount of the "windfall" payments, $414,000, and 96 percent of the "supplemental" payments.

The financial results of the trunkline carriers in the last several years indicate that they can ill-afford such a drain on their resources.[69] Thus, the very argument of the Local Service Carrier Parties that their strike losses would be borne largely by the nonsubsidized trunkline carriers weighs against sanctioning local service carrier membership in the mutual aid agreement.

The Local Service Carrier Parties claim that their vulnerability to strikes has resulted in increasingly costly wage settlements in recent years. They point to evidence that the average annual salary on local service carriers rose 54 percent from 1965 to 1970 compared with 48 percent on the trunkline carriers. They also note evidence indicating that settlements on local service carriers since

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[69] The rate of return on investment of the Trunkline Carrier Parties for the period 1967 through 1970 was as follows:

Year	*Rate of Return*
1967	8.0%
1968	5.4
1969	4.2
1970	1.5

Source: Trunkline Carrier Exhibit No. 36.

October 1968 have resulted in an average increase in annual continuing costs of 12.2 percent as compared with 10.7 percent on trunkline carriers. [70] The Local Service Carrier Parties conclude from these data that the unions have been more successful in pressing inflationary demands upon the local service industry than upon the trunkline industry and attribute the reason to knowledge on the part of the unions that local service carriers cannot afford to take strikes.

These contentions are unpersuasive. Since 1965 the equipment of the local service carriers in the small jet category has become comparable to that of the trunkline carriers to a large degree. Moreover, the local service carriers have extended their operations considerably and are operating comparable service over route segments formerly reserved for trunkline carriers. These factors explain in large part the narrowing of the salary gap between the local service and trunkline carriers. In addition, Mohawk's actions exemplify the fact that the local service carriers have not surrendered to a strike threat when they believed suffering a strike was justified.

The record does not display an urgent need on the part of local service carriers to join the mutual aid agreement. Nor does it reveal that local service carriers are especially inviting targets for union attempts to establish new industry precedents. Rather, it shows that mutual aid is not sufficient to overcome the difficulties of a carrier with deep-seated financial inadequacies and that, where a carrier is more firmly braced, the carrier can rebound

[70] The record shows that, as of December 31, 1971, local service carriers having contracts with IAM were paying hourly rates in many classifications equaling or exceeding the rates paid by the trunkline carriers.

successfully from the adverse effects of a strike without mutual aid.[71]

The trauma of Mohawk[72] demonstrates that the heavy financial advantages of mutual aid to a struck carrier are insufficient to avoid the consequences of the lack of adequate financial underpinning. Even with mutual aid, the carrier has resorted to the merger path to resolve its problems.

On the other hand, while a 30-day strike on Piedmont in 1969 took a heavy toll of the carrier, it bounced back strongly. The carrier estimates that it suffered an operating loss for the period of the strike in the amount of $1,770,[illegible]. The operating loss for the year was $161,341. [illegible] realized an operating profit [illegible],922 in 1970, more than twice the 1968 operating profit of $740,207. Instead of the union attempting to establish an industry-wide precedent through a local service carrier, this situation involved an attempt to enforce on a local service carrier an arbitration decision applicable to a trunkline carrier (United) requiring the use of three-man crews on the Boeing 737.[73]

Ozark overcame the adverse effects of a strike even more successfully. Ozark was struck for five days in 1970. The carrier estimates it lost (during and post-strike) $838,085 as a result of the strike. Nevertheless, it enjoyed an operating profit of $1,361,688 in 1970, a complete reversal of its 1969 picture when it incurred an operating loss of $1,195,493.

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[71] The rate of return on investment [illegible] carrier's subsidy contains recognition for the [illegible] Final Mail Rate Case, Report, 42 C.A.B. at 213.

[72] And of Capital.

[73] The experience of Air W[illegible] does not safeguard a local service carrier [illegible]

In light of the foregoing, approval of local service carrier participation in the mutual aid agreement is not consistent with the public interest.

Disapproval Should Operate Prospectively

Section 4 of the mutual aid agreement provides, in part:[74]

> This Agreement shall become effective as of October 31, 1969, and shall be filed with the CAB. If this Agreement shall be disapproved by the CAB, it shall terminate forthwith to the extent disapproved, and payments made hereunder, to the extent they are affected by the terms of such disapproval, shall become and be treated as obligations owing from the receiving party to the paying party.

Section 3 of the local service carrier amendments reads similarly.[75]

In light of the decision herein, if the provisions of the agreement were permitted to take effect, all payments which exceed the 25 percent "standard amount" provision, as the agreement read prior to October 31, 1969, would have to be returned. National would be required to give back $9,459,000, Northwest to return $15,368,000, and TWA to restore the entire amount of "supplemental" payments, $805,000, to the paying carriers. In addition, Mohawk would have to turn back the complete amount of mutual aid it received, $5,861,000.

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[74] Appendix A, p. 7.

[75] "[T]his Amendment shall be filed with the CAB upon execution. If this Amendment is disapproved by the CAB, in whole or in part, it shall terminate forthwith, and payments made hereunder shall become and be treated as obligations owing from the receiving party to the paying party." *Id.* at 11.

Opinion

The Board's order of remand explicitly placed in issue the question of whether disapproval of any of the amendments should operate prospectively only. The Six Union Parties are the only parties to address that issue directly. They contend that disapproval should be applied retroactively on the ground that there is no sound reason why a carrier should be rewarded for having engaged in conduct adverse to the public interest and the industry while it seeks approval of its agreement. The Six Union Parties maintain that prospective disapproval simply encourages irresponsibility in this area. The Bureau urges that, apart from the general question of local service carrier participation, Mohawk's receipt of pact benefits should not be disapproved for a strike in progress at the time the carrier entered the agreement.[76]

The Examiner is convinced that, to the extent the amendments of the mutual aid agreement are rejected herein, the disapproval should function prospectively. It cannot be overlooked that the Board initially approved the October 1969 amendments, and even when it decided to remand the proceeding for a further evidentiary hearing declared, "We are not presently persuaded that our earlier determination was in error."[77] Moreover, implementation of the amended agreement pending decision was fully lawful.[78] In these circumstances, it would require compelling circumstances to justify applying this decision retroactively.

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[76] ALPA states that it recognizes disapproval of the amendments does not necessarily require return of the amounts paid as received, but it does not set forth a position on this question.

[77] Order 70-11-110 at 2.

[78] Airlines Mutual Aid Pact, Order 71-3-183, March 30, 1971.

Of course, as has been indicated, the amended agreement itself renders the receiving carriers liable to the extent the agreement is disapproved. But the effectuation of these provisions would be a disservice to the public interest. Some of the payments were made as long as two years ago with apparent anticipation by both paying and receiving carriers that the amended agreement would be approved. Both paying and receiving carriers conducted their operations and drew their financial plans on that basis. To enforce a pay back at this point in time could cause substantial detriment to the recipients of mutual aid. Moreover, in the final analysis, there is no showing that requiring a reversion of mutual aid receipts made excessive or disapproved by this decision would advance any statutory objective.

No sound reason appears to uphold the Six Union Parties' contention that disapproval prospectively would promote irresponsibility. Certainly the impact of prospective disapproval on the carriers making the mutual aid payments should discourage carriers in the future from indiscreet action in relation to agreements pending Board approval under section 412.

Mutual Aid Agreement Approved if Modified

The mutual aid agreement stands before the Board as amended October 31, 1969, and December 10, 1970. As has been discussed heretofore, the increases in the "standard amount" and concomitant potential liability of the paying carriers and the admission of the local service carriers are inconsistent with the objectives of the Act. If the agreement were modified to conform with the instant decision, it would be substantially in the form approved by the Board

for an indefinite period.[79] Accordingly, the mutual aid agreement shall be approved subject to the conditions previously imposed by the Board[80] and to modification of the agreement by the parties thereto in accordance with the requirements of this decision.

Ultimate Findings

On the basis of the foregoing facts and considerations and all of the evidence of record,[81] it is found that the mutual aid argeement is not adverse to the public interest or in violation of the Federal Aviation Act of 1958, as amended, and should be approved, subject to the following conditions:

1. The agreement shall be modified so that:

a. In section 1(B)(1), the "standard amount" shall not exceed 25 percent;

b. In section 1(B)(2), the obligation of any party to the agreement to make additional payments shall not exceed one-half of one percent of its air transport operating revenue for the prior calendar year;

c. In section 4, no carrier receiving mutual aid subsequent to October 31, 1969, and prior to the effective date of this decision as the decision of the Board shall be obligated to repay amounts received in excess of the amounts

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[79] Order 70-7-114, reconsideration denied in part, Order 70-11-110. The ingress and egress features and the arbitration provisions of the agreement would be different. But these changes have not been directly litigated and are not adverse to the public interest or in violation of the Act.

[80] Order 70-7-114.

[81] Contentions of the parties not discussed herein have been considered by the Examiner and Board after the decision.

receivable pursuant to the modifications prescribed herein; and

d. The December 10, 1970, amendment shall be eliminated, provided that no carrier receiving mutual aid pursuant to such amendment prior to the effective date of this decision as the decision of the Board shall be obligated to repay such receipts;

2. Not later than ten days after the effective date of this decision as the decision of the Board, there shall be filed with the Board amendments to the agreement in conformance with the moifications mandated in paragraph 1. above;

3. The approval shall not be deemed a determination of the reasonableness of the financial provisions of the agreement for future ratemaking or other regulatory provisions under the Act;

4. The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

5. In accounting for the amounts due to others and the amounts due from others under the agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by Part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the agreement as may be reasonably required by the Director of the Board's Bureau of Operating Rights; and

6. Copies of all arbitrator's decisions and awards issued under this agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

It is further found that the motion of the Local Service Carrier Parties to strike portions of the joint brief of APA and AMFA should be granted.

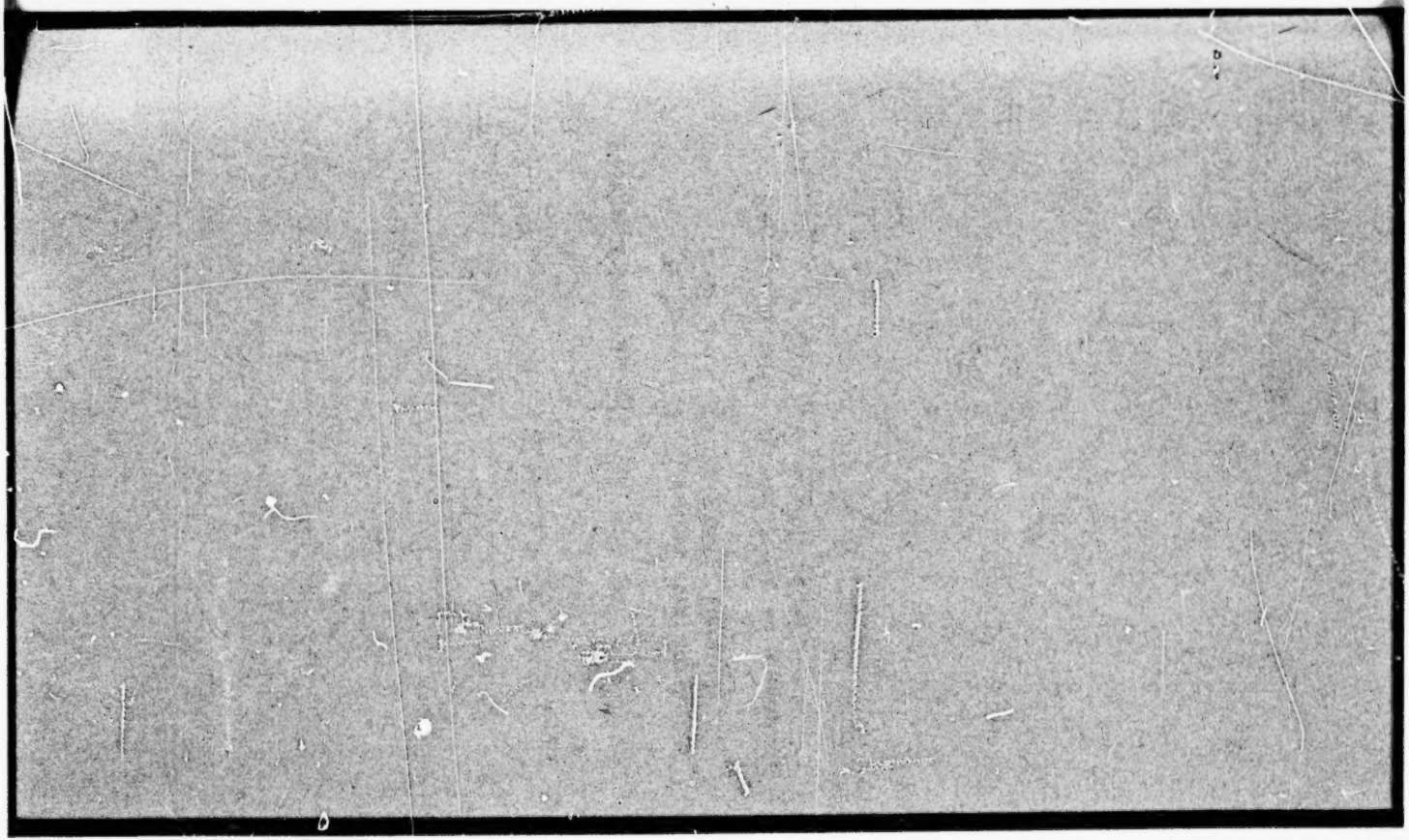
An appropriate order is attached.

APPENDIX E

Pertinent Sections of:

Railway Labor Act, as Amended,
45 U.S.C. §152 (First), (Ninth)

Federal Aviation Act of 1958, as amended,
49 U.S.C. §1371, §1382



Railway Labor Act, as amended (45 U.S.C. 152)

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may par-

ticipate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

The Federal Aviation Act of 1958, as amended (49 U.S.C. 1371)

"(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transporation.

"(k)(4) It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with sections 181-188 of Title 45."

The Federal Aviation Act of 1958, as amended (49 U.S.C. 1382)

"(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

"(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it."

SUPREME COURT, U. S.
FILED
DEC 6 1974
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-709

AIR LINE DISPATCHERS' ASSOCIATION, ET AL.
Petitioners,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

and

AMERICAN AIRLINES, INC., ET AL.,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December, 1974

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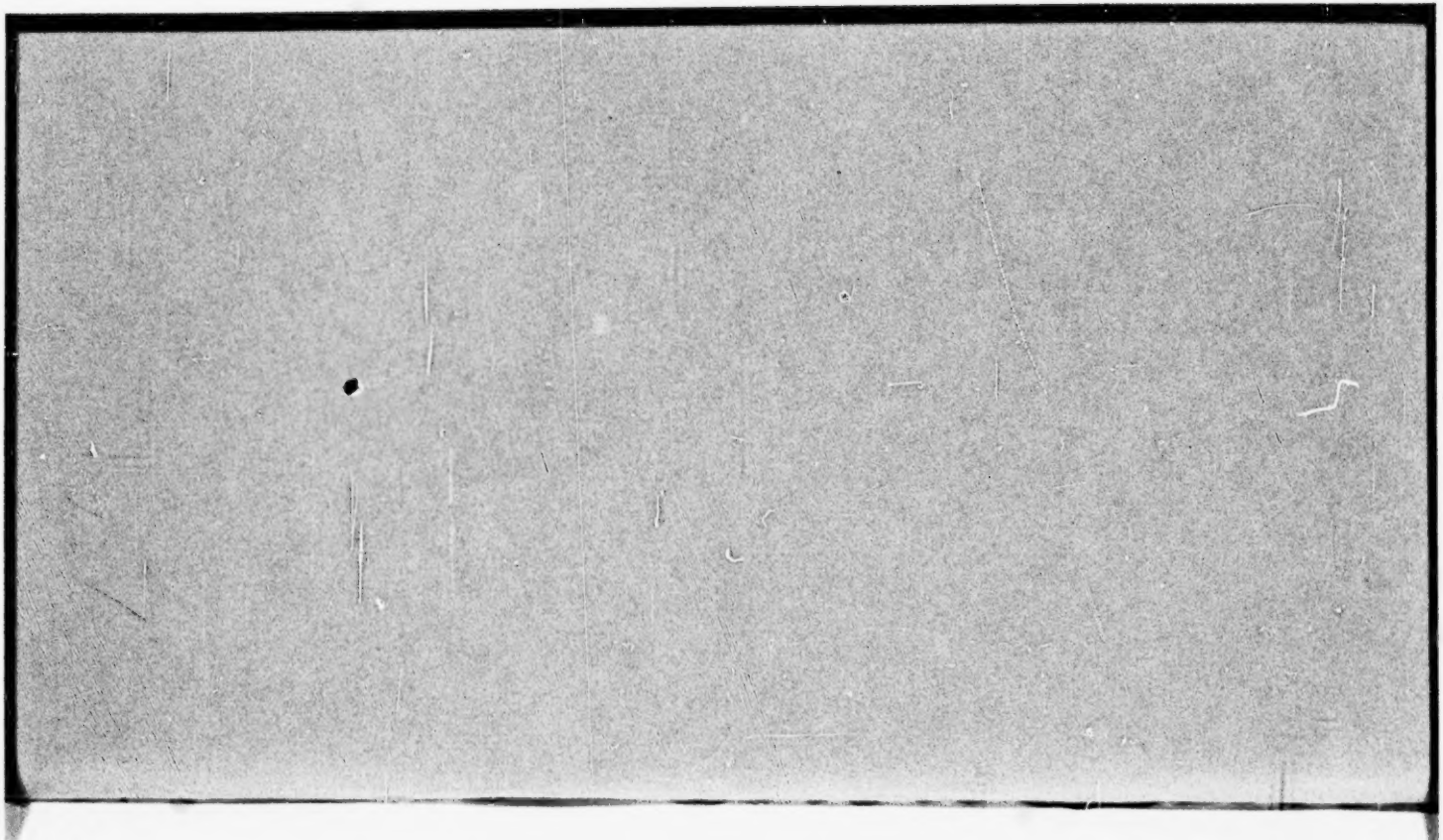

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Air Line Dispatchers' Association, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, Communication Workers of America, Flight Engineers' International Association, International Association of Machinists and Aerospace Workers, and Transport Workers Union of America, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 8, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at — U.S. App. D.C. —, 502 F.2d 453 (1974), and appears in the Appendix volume on page iv thereof as Appendix A.[1] Order No. 70-7-114 of the Civil Aeronautics Board, issued July 23, 1970, approving, without an evidentiary hearing, the Mutual Aid Pact is not reported and is reprinted as Appendix I at page 142a of the Appendix volume. Order No. 70-11-110 of the Civil Aeronautics Board, issued November 23, 1970, vacating Order No. 70-7-114 and remanding the proceeding for evidentiary hearing is not reported and is reprinted as Appendix J at page 221a of the Appendix volume. Order No. 73-2-110 of the Civil Aeronautics Board, issued February 27, 1973, approving the Mutual Aid Pact is not reported and is reprinted as Appendix K at page 225a of the Appendix volume.

Also printed in the Appendix volume are the decisions and orders of the Civil Aeronautics Board which preceded the Order from which this appeal is taken and which approved the original Mutual Aid Pact and all but one of the amendments thereto: Order E-13899 is reported at 29 C.A.B. 168 (1959) and is reprinted as Appendix B at page 5a; Order E-14563 is reported at 30 C.A.B. 90 (1959) and is reprinted as Appendix C at page 35a; Order E-15413 is reported at 31 C.A.B. 977 (1960) and is reprinted as Appendix D at page 41a; Order E-21044 is reported at 40 C.A.B. 559 (1964) and is reprinted as Appendix E at page 44a; Order E-24213, disapproving inclusion of local service carriers in the Mutual Aid Pact, is not reported and is reprinted as

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[1] The Appendix, separately printed, will be referred to subsequently in this Petition as "App. p. —".

Appendix F at page 130a; Order E-26000, issued November 17, 1967, is not reported and is reprinted as Appendix G at page 134a; and, Order 70-1-100, issued January 20, 1970, is not reported and is reprinted as Appendix H at page 138a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1974. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board may approve agreements under Section 412(b) of the Federal Aviation Act as not adverse to the public interest because such agreements alter the balance of collective bargaining power in the industry and when it has found that such agreements "may well" tend to prolong interruptions to air commerce?

2. Whether the Civil Aeronautics Board violates its Congressional mandate to foster sound economic conditions in the air transport industry by permitting financially weak carriers to determine for themselves whether to join the Mutual Aid Pact and thereby become subject to the additional financial drains of supporting opposition to strikes on other carriers?

STATUTORY PROVISIONS INVOLVED

Those provisions of the Federal Aviation Act, 49 U.S.C. Secs. 1301 *et seq.*, and the Railway Labor Act, 45 U.S.C. Secs. 151, *et seq.*, which are material to the disposition of this Petition are reprinted as Appendix L beginning at page 331a of the Appendix volume.

STATEMENT OF THE CASE

The original Mutual Aid Pact was executed on October 30, 1958, effective October 20, 1958, between American, Capital, Eastern, Pan American, TWA, and United airlines. The Pact provided mutual assistance in the event that the flight operations of any party thereto was shut down by reason of (1) a strike called to enforce union demands in excess of or opposed to the recommendations of a Presidential Emergency Board appointed under Section 10 of the Railway Labor Act; or (2) a strike called before exhaustion of the procedures of the Railway Labor Act in disputes between carriers and employees; or (3) a strike which is "otherwise unlawful".[2] The assistance provided was in the form of an agreement by the air carriers to pay to the strike-bound carrier the increased revenues of the other carrier parties which were attributable to the strike, less applicable added direct expenses. These were called "windfall payments".

The Pact was amended from time to time over the years until it culminated in its present form which was approved by the Respondent Civil Aeronautics Board decisions now presented to this Court for review.

The history of the Mutual Aid Pact is one of continual extension and expansion from an agreement which was approved by the Respondent Board because it did not hinder achievement of the objectives of Section 102 of the Federal Aviation Act, 49 U.S.C. Sec. 1302, *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168, 173 (1959) (App. p. 10a), *recon. den.* 30 C.A.B. 90 (1959) (App. p. 35a), to an agreement which has been ap-

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[2] The 1960 amendments to the Pact, approved by Respondent in 1964 (App. pp. 44a, *et seq.*), extended payment coverage to all strikes not in contravention of recommendations of a Presidential Emergency Board. (App. p. 45a.)

proved precisely because it alters labor-management collective bargaining balance in favor of management and places additional "restraints [upon employees] consistent with collective bargaining". (Respondent's Majority Opinion, App. pp. 233a-234a, 251a.)

The latest amendments approved by the Respondent did not increase the level of "windfall payments" but provided a maximum level of supplemental payments to a struck carrier of 50% of its normal operating expenses during the first two weeks of a strike, 45% for the third week of the strike, 40% for the fourth week, and 35% for any period thereafter. The amendments also increased the annual maximum liability of any one participating air carrier for supplemental payments by doubling its liability from ½% to 1% of that carrier's air transport gross operating revenues for the carrier's previous calendar year.

The October 1969 amendments to the Mutual Aid Pact also permitted any trunkline carrier to join the Pact by November 15, 1969, without a waiting period or back payment period. In addition, the amendments permitted withdrawal by any carrier party effective at the end of any calendar year beginning December 31, 1972, on one year's notice; and, the Pact was modified to provide that disputes concerning the amount of any payment would be subject to arbitration.

Although the Petitioners opposed approval of the 1969 amendments on the ground that there had been no evidentiary hearing thereon, the Respondent approved the agreement as amended. (App. p. 142a.) The Petitioners filed a timely petition for reconsideration of that order and the Respondent then determined that since the agreement, as amended, had not been subjected to evidentiary hearing, it should be remanded for such hearing. (App. p. 221a.)

Before such a hearing could be undertaken, however, the carriers once again broadened their agreement by amending it to permit local service carrier participation therein. As thus amended, the Mutual Aid Pact was approved by the Respondent on February 27, 1973 (App. p. 125a), following an oral hearing before Administrative Law Judge Arthur S. Present who recommended disapproval of the amendments. (App. p. 271a.)

The Administrative Law Judge held that the increased level of Mutual Aid Pact payments created perils which might undermine the objectives of the Federal Aviation Act. (App. p. 295a.) He also found that carriers could "utilize the higher level of payments" as a consideration in determining the most opportune time to settle a strike (App. p. 296a), citing the record example of TWA which "was financially better off during the two-day strike it incurred in 1970 than if it had fully operated on those days" and Mohawk which had operated at a profit during a strike period with Mutual Aid benefits but which operated at a net loss without a strike even though it had received $592,000 in governmental subsidy payments during the latter period. (App. p. 297a.) The Administrative Law Judge concluded that the "higher level of mutual aid payments may sway a carrier's decision as to when it should settle a strike, to the detriment of the public utilizing air transportation". (App. p. 297a.)

The Administrative Law Judge also disapproved the increase in a carrier member's liability from 1/2% to 1% of its prior year's operating revenue on his conclusion that such an increase could impair the financial condition of certain carriers. (App. p. 299a-300a.)

The Administrative Law Judge cited the reduction of United Air Lines' working capital from an estimated $47,225,000 to $17,520,000 because of its Mutual Aid Pact liability and the payment by Pan American of $9,404,000 in 1970 on the basis of a year in which its rate of return was negative (1969)—70% of those payments being "supplemental" payments. (App. p. 300a.) The Administrative Law Judge found that of the $187,485,000 paid out under Mutual Aid Pact from 1958 through June 1971, 45%, or $84,368,250, was attributable to but four strikes since the inception of the 1969 amendments and that 27% of the total Mutual Aid Pact payments since 1958, or $49,688,000 were reflected in the "supplemental" payments made in connection with four strikes in the 20-month period between October 1969 and June 1971. (App. p. 300a.)

The Administrative Law Judge also concluded that local service carriers should be excluded from the Mutual Aid Pact because their participation would be inconsistent with the public interest and inconsistent with the statutory scheme as reflected in Section 406 of the Federal Aviation Act, 49 U.S.C. 1376. These conclusions were based upon a number of findings. (See, *e.g.*, App. pp. 303a, 304a, 305a, 306a, 307a.)

The Civil Aeronautics Board by a three-to-two vote reversed the Administrative Law Judge and approved the amendments *in toto*. In deciding to approve the Pact, as amended, the Board determined the primary issue to be:

> "Whether the mutual aid payments so shifted the bargaining balance in favor of carriers as to create a serious likelihood that a carrier might resist settlement of a strike on a reasonable basis in

a circumstance where such a settlement was possible." (App. pp. 233a-234a.) [3]

The three-member majority of the Board found that the increased payments provided by the Mutual Aid Pact were for the purpose of increasing a "carrier's willingness or ability to resist union demands which the carrier considers to be unreasonable" (App. p. 235a) but that such purpose was not adverse to the public interest since other economic pressures existed which would prevent the carrier from being "significantly influenced" by reason of mutual aid payments "to resist what it considered to be a reasonable settlement, or to try to force unreasonable concessions on the part of labor." [4] (App. pp. 235a-236a.)

The Majority held that the operating profit received by the members of the Pact during strikes because of augmented mutual aid payments provided by the amendments to the Pact "fall far short of real profits" because of "anticipated profits" which they [the struck carriers] otherwise would have achieved, as well as post-strike losses." (App. pp. 238a-239a.) The Ma-

[3] This issue was specifically rejected by the Board in its original decision as irrelevant in the consideration of the approval of the Mutual Aid Pact. (App. pp. 10a-10b, 14a-14b.)

[4] Regarding these findings of Respondent, Petitioners submit that the dissenting opinion accurately and effectively demonstrates its basic invalidity (App. p. 260a, n. 5):

> According to the majority, it is only 'unreasonable' union demands which will thus be resisted. But one man's unreasonable demand is another's reasonable request; as we have already pointed out, it is both futile and contrary to the Board's proper role as a neutral in labor conflicts to attempt to analyze the effects of the mutual aid amendments in these terms."

jority rejected the conclusion of the Administrative Law Judge that the interim profit payments under the Pact amendments created a dangerous tendency to prolong a strike upon its finding that in the National Airlines strike the carrier had accepted a proffer of arbitration but such proffer had been rejected by the union; the union rejected arbitration in the Northwest strike before the company had indicated whether it was willing to arbitrate; and, in the Mohawk strike the union would not agree to arbitration only on part of the issues as the carrier desired but would only agree to arbitrating on all of the issues in dispute.[5] (App. pp. 239a-240a.) The Majority held that the Pact provided "substantial protection from financially crippling strike losses, at a cost which is reasonable" even though the amended Pact might result in imposing "a certain financial burden on carriers which may be financially weak." (App. pp. 244a-245a.)

The Majority concluded its opinion by expressing the tacit belief that absent the amendments to the Mutual Aid Pact, the employees of carriers could compel their employers to accept all requests made by the employees. (App. p. 250a.)

The dissenting members of the Board at the outset of their opinion found it necessary to comment upon the obviously partisan character of the Majority's opinion. (App. pp. 255a-257a.) The Majority had stated the issue in the case in terms of shifting the bargaining balance in favor of carriers. *See supra*,

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[5] In each of these contrary situations—Labor's refusal to arbitrate all issues in the National Airlines strike and Management's refusal to arbitrate all issues in the Mohawk strike—Respondent places the onus on Labor for prolonging the strike by refusing to arbitrate in the manner desired by Management.

pp. 7-8. The dissenting members strenuously disapproved of the Majority's injection of the Civil Aeronautics Board into the bargaining structure of the industry (App. pp. 255a-257a) and rejected the issue as phrased by the Majority (App. pp. 233a-234a):

> "In our view, the issue is not whether the strengthening of airline management's bargaining position which obviously results from the 1969 mutual aid amendments is a good thing *per se*—a judgment which in our view the Board need not and should not make—nor is it whether airline employees retain effective bargaining power, which they patently do. The issue, rather, is whether under some significant sets of circumstances the 1969 amendments may give carrier management an incentive to act irresponsibly in prolonging a strike."

On March 5, 1973, the Petitioners filed a timely petition for review of the Respondent's decision with the United States Court of Appeals for the District of Columbia Circuit. A decision adverse to Petitioners was rendered by that Court on October 8, 1974, and this Court granted Petitioners an extension until December 6, 1974, in which to file their Petition For a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

The Respondent Has Arrogated to Itself the Authority To Alter Collective Bargaining Relationships in the Air Transport Industry.

Section 412 of the Federal Aviation Act, 49 U.S.C. Sec. 1382, requires the Respondent to disapprove an agreement between air carriers if it is "adverse to the public interest, or in violation of this Act . . . ." Vio-

lations of provisions of the Railway Labor Act are determined to be violations of the Federal Aviation Act, 49 U.S.C. Sec. 1371(k)(4).

In approving the Mutual Aid Pact as amended in its most recent form, the Respondent found the Pact was not adverse to the public interest *because* the Pact strengthened the bargaining power of air carriers and placed additional "restraints [upon employees] consistent with collective bargaining." (App. pp. 233a-234a, 251a.) Section 412(b) does not authorize the Respondent to approve agreements which contravene the design for collective bargaining and labor relations designed for the air transport industry by the Congress in its enactment of the Railway Labor Act. To the contrary, in passing upon agreements submitted to it pursuant to the provisions of Section 412 (b), the Respondent is restricted to interpreting the public interest in terms of elements related to those listed in Section 102 of the Federal Aviation Act, 49 U.S.C. Sec. 1302; and, it seriously encroaches upon the powers conferred by Congress on other governmental agencies under the terms of the Railway Labor Act when it approves an agreement under Section 412 (b) which "may well" tend to prolong interruptions to air commerce. (App. p. 235a.) [6]

The Respondent, or at least a bare majority of its members, may be of the opinion that the Congressional design for collective bargaining has left the air car-

[6] Section 2 of the Railway Labor Act, 45 U.S.C. Sec. 151a, sets forth two of the general purposes of that Act to be: "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; * * * (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; . . . ."

riers at the mercy of the unions representing their employees (App. pp. 234a, 250a); however, it is not the prerogative of the Respondent to approve agreements under Section 412(b) of the Federal Aviation Act because they will correct real or imagined imbalances in collective bargaining power. Such actions by Respondent run directly counter to principles enunciated by this Court in *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 490, 497-498 (1960); *see* also, *H. K. Porter Co., Inc.* v. *NLRB*, 397 U.S. 99 (1970). In the *Insurance Agents'* case, this Court held that not even the National Labor Relations Board could base its conclusions upon an attempted equalization of "disparities of bargaining power between employer and union". If such is the case with respect to the agency created by Congress as expert in the field of labor relations, then *a fortiori*, an agency which has no special expertise in that field cannot validly base a decision upon its determination of "whether the mutual aid payments so shift the bargaining balance in favor of carriers as to create a *serious* likelihood that a carrier might resist settlement of a strike on a *reasonable* basis in circumstances where such a settlement was possible." (Emphasis supplied.) (App. pp. 233a-234a.)

In the instant case the Respondent arrogated to itself authority to interpret the public interest under Section 412(b) of the Federal Aviation Act solely in terms of the adjustment of the balance of collective bargaining power in the air transport industry. In doing so, it is respectfully submitted, the Respondent violated principles enunciated by this Court and set a dangerous precedent establishing Respondent's control of and interference in collective bargaining affairs in the air transport industry.

The Court below failed to address itself to this issue, determining instead to view the matter negatively as a refusal by the Respondent to interfere with the parties' choice of economic weapons. (App. pp. viii-x.) Such a view ignores the affirmative holding of Respondent that the Pact was not inconsistent with the public interest for the very reason that it shifted the balance of power in collective bargaining to management.

More significantly, the Court below impliedly endorsed the Respondent's stated concept that an administrative agency, if unsatisfied with the law as written by Congress, can take whatever steps it believes are necessary to change it. At page 25 of its majority opinion (App. p. 250a) the Respondent appeared to acknowledge the exclusive role of Congress in formulating our national policy with regard to work stoppages in the air transport industry, but immediately stated its intent to take such steps as it believes necessary to correct a situation "*whether by law* or undue economic pressure" carriers are compelled "to accept all requests of employees."[7] (Emphasis supplied.)

The Respondent based its decision upon an issue about which it had no expertise—the determination of when a shift in the balance of bargaining power becomes adverse to the public interest. The Respondent's original Mutual Aid Pact decision in 1959 was decided upon the proper issue—whether the Pact hindered the achievement of the objectives of Section 102 of the Federal Aviation Act, 49 U.S.C. 1302. (*Six Carrier Mutual Aid Pact*, 29 C.A.B. 168 at 173 (1959), *recon. den.* 30 C.A.B. 90 (1959); App. pp. 10a,

[7] There is no evidence of record nor was there a claim by air carriers that any carrier was ever compelled to "accept all requests of employees".

35a.) Application of that general issue in terms appropriate to the instant proceeding was phrased properly by the dissenting members of Respondent (App. p. 261a):

> "The issue, rather is whether under some significant sets of circumstances the 1969 amendments may give carrier management an incentive to act irresponsibly in prolonging a strike."[8]

The Respondent did not act within the framework of the limited authority granted it by Congress in the Federal Aviation Act. The Respondent, instead, acted within a framework of its own creation: self-authorized to pass upon intercarrier agreements in terms of their effect upon the balance of collective bargaining power within the air transport industry. In so acting, the Respondent exceeded its authority and the Court below erred in failing to confront and deal with that issue.

II.

The Respondent Erred in Permitting Financially Weak Carriers To Determine Whether To Become Obligated Under the Pact.

Under the Pact as approved by Respondent, a member carrier is liable to a payment of up to 1% of its prior year's air transport operating revenue to support a struck carrier. Both the Administrative Law Judge and the dissenting members of Respondent concluded that the basic defect in the provision was

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[8] Respondent recognized that the Mutual Aid Pact amendments "may well" tend to prolong strikes but only when the unions act "unreasonably". (App. p. 235a; but see footnote 4, *supra*, at page 8.) The Court below upheld the Respondent's decision citing the fact that fewer strikes had occurred since the amendments. The Court, however, did not address itself to the cause of the extended length of those strikes. (App. pp. 11a and 12a.)

that it took "no account of the current financial condition of a paying carrier." (App. p. 264a.) Obviously, such payments could seriously weaken a carrier's ability to serve the public if its current financial condition had deteriorated from its condition during the prior year. The dissenting members of Respondent noted, for example, that while the evidence disclosed that Pan American had paid out over $10 million in mutual aid payments in 18 months, that carrier's financial condition had been considered so precarious by the Respondent that it had recently rejected the acquisition of Caribair Airlines by Eastern Airlines because of a possible diversion of less than $10 million from Pan American if the acquisition took place.[9] (App. p. 265a.) The continuing financial deterioration of Pan American is a matter of public knowledge yet that carrier remains obligated under the Pact.

The Respondent, in considering this aspect of the Pact, permits a carrier to make its own choice as to whether to chance liability for such payments (App. p. 246a) despite its conclusion that "the higher payments" may well "impose a certain financial burden on carriers that may be financially weak". (App. p. 245a.)

The Respondent thus has acted in derogation of the mandate contained in Section 102 of the Federal Aviation Act (49 U.S.C. Sec. 1302) to regulate "air transportation in such manner as to . . . foster sound economic conditions in such transportation . . . ."

---

[9] Pan American has paid out at least a net of $21,846,000 under the Pact. (App. p. 300a.)

The Court below simply adopted, without analysis, the findings and conclusions of Respondent, including the Respondent's reference to Pan American's payment of only .48% of its operating revenues for the period of January 1, 1970, to June 30, 1971, as support for those findings and conclusions.[10] (App. pp. xvi-xvii; 243a-244a.)

It is respectfully submitted that so substantial a departure from its responsibilities under the Federal Aviation Act warrants thorough review and reversal by this Court.

III.

The Respondent's Interference in and Disruption of the Scheme of Labor Relations Becomes More Pronounced upon Consideration of Its Decision in the Air Conference Case.

At the time the Respondent approved the amended Mutual Aid Pact, there was pending before it agreements submitted by the Airlines Industrial Relations Conference (AIRCON), an association comprising most of the air carriers in the United States.[11] AIRCON would establish an organization through which its carrier members could take consistent positions in bargaining with each union on each of the carrier members thereby effectively imposing upon unions multi-employer bargaining in violation of the

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[10] As noted, *supra*, at page 15, the .48% of Pan American's operating revenue amounted to over $10 million; an amount the Respondent had previously considered as a threat to the already precarious financial condition of that carrier.

[11] The AIRCON agreements have now been conditionally approved by the Respondent. (Board Order No. 73-6-96 of June 22, 1973.) The Board's order has been appealed to the United States Court of Appeals for the District of Columbia Circuit. That Court has scheduled December 12, 1974, as the date for hearing oral arguments in that case.

provisions of the Railway Labor Act. *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line Railroad Co.*, 127 U.S. App. D.C. 298, 383 F.2d 225 (1967), *cert. den.* 389 U.S. 1047 (1968).

The result of the combined existence of AIRCON and the Mutual Aid Pact is the confrontation by the employees of the industry with industrywide consistent bargaining positions on the one hand and the carriers' ability to operate at a profit during a strike on the other. (App. pp. 237a, 261a.) The combined operation of these agreements totally reforms labor relations in the air transport industry from those designed by Congress in its enactment of the Railway Labor Act.

The Respondent refused to consider the combined effects of these agreements. That refusal was both arbitrary and capricious and justified the setting aside of its decision. The Court below, however, did not address itself to that issue.

There would seem to be little doubt that the decision of the Court of Appeals in the AIRCON case will be the subject of a petition to this Court for a writ of certiorari. In light of that fact; because of the close relationship of these cases as reformations of labor relations in the air transport industry; and, because their combined effect upon those relations are more pronounced than their individual isolated effect, it is respectfully suggested that this Court may wish to defer action upon this petition until this case and the AIRCON case can be considered together.

CONCLUSION

The Respondent cannot be permitted to base its decisions upon considerations which have been reserved by Congress to other tribunals or, indeed, to itself. The Respondent cannot be permitted to determine in what manner and to what extent the balance of bargaining power in the air transport industry may be shifted. Nor may Respondent be permitted to abdicate its responsibility to the public and to the industry by permitting financially weak carriers to decide for themselves whether they should undertake the burden of financially supporting other carriers during strikes.

The petition for writ of certiorari should be granted or, in the alternative, this Court may wish to defer action thereon pending presentation to it of a petition for such a writ in the AIRCON case.

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December 6, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-710

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

—against—

CIVIL AERONAUTICS BOARD,
Respondent,

—and—

AMERICAN AIRLINES, INC., *et al.*,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1974

No.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—against—

CIVIL AERONAUTICS BOARD,

Respondent,

—and—

AMERICAN AIRLINES, INC., *et al.*,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Air Line Pilots Association, International ("ALPA") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled action on August 8, 1974.

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at —— U.S. App.D.C. ——, 502 F.2d 453. It is reprinted as Appendix

A in the separate Appendix volume submitted herewith. Order 70-7-114 of the Civil Aeronautics Board ("Board" or "CAB"), approving the airline industry Mutual Aid Pact as amended, is reprinted as Appendix I and is not reported. Order 70-11-110 of the CAB, vacating Order 70-7-114 and remanding for further evidentiary proceedings, reprinted as Appendix J, is not reported. Order 73-110 of the CAB, approving the Mutual Aid Pact as amended, reprinted as Appendix K, is not reported. Earlier orders of the CAB on the Mutual Aid Pact are reprinted as Appendices B through H.

Jurisdiction

The judgment of the Court of Appeals was entered on August 8, 1974. This Court has jurisdiction to review the judgment herein by writ of certiorari under 49 U.S.C. § 1486(f) and 28 U.S.C. § 1254(1).

Questions Presented

(1) Is a multi-carrier plan participated in by nearly all U.S. air carriers and having the following chief attributes:

> Virtually all U.S. air carriers* are members and contribute financially;
>
> Pact payments permit a carrier to bargain with a single union having financial assurance that the acceptance of a strike may be more profitable than continued service;

---

* Excluding Delta, Allegheny, and Southern.

The Pact widens industrial disputes by multicarrier participation beyond the bargaining unit without consent to multicarrier bargaining by the bargaining unit representative;

The Pact has been accompanied by long service interruptions in air transportation;

The Pact requires contributions from all carriers without regard to ability to pay;

It demonstrably depends upon confrontation labor tactics;

It enables the carrier to render such or no service as it may choose irrespective of its certificated obligations;

consistent with national labor policy and public interest as enunciated in the Federal Aviation Act of 1958?

(2) Is a multi-carrier negotiating and anti-strike plan which brings to bear the economic strength of the entire industry in the collective bargaining process on a single air carrier, accompanied by assurance of financial support to the single carrier immediately involved, in an amount which makes the acceptance of a strike more financially rewarding than the settlement of a dispute and which widens the single carrier and labor organization dispute to an industry-wide confrontation, consistent with the national labor policy and the provisions of the Railway Labor Act?

(3) Is a multi-carrier combination and conspiracy to contain or depress labor costs throughout an entire industry consistent with the antitrust laws of the United States or subject to the power of the CAB to exempt from antitrust regulation?

Statutes Involved

The pertinent provisions of the Railway Labor Act, as amended (45 U.S.C. § 151 *et seq.*), the Federal Aviation Act of 1958, as amended (49 U.S.C. § 1301, *et seq.*), the Sherman Act (15 U.S.C. § 1 *et seq.*) and Clayton Act (15 U.S.C. § 12 *et seq.*) are set out as Appendix L.

Statement of the Case

In summary, the Mutual Aid Pact is a multi-carrier Pact having almost industry-wide U.S. airline participation, including Pan American World Airways. Mutual Aid Pact participants have obligated themselves to assessments payable to a carrier struck as a result of a labor dispute with a particular union. As designed under the Pact and applied, the carrier in negotiations is assured in advance that if it is struck a total sum will be received which has turned a losing operation into a profit-making picture during the strike period. Coupled with the selection by the struck carrier of the operation of its most profitable routes and denial of service over monopoly routes generating the least profit, in order to maximize Pact profits, the net effect has been to make acceptance of a total or partial strike more attractive and desirable than a settlement. When, as it has been applied, this is tied to acceptance of a strike during off-peak season the negative incentive to the early settlement of labor disputes is greatly compounded.

The Mutual Aid Pact is based upon the premise of confrontation labor tactics by the infusion of massive working capital. This escalates the single carrier dispute into actual industry-wide confrontation. Although not so

denominated, the industry-wide bargaining and confrontation occurs, without the consent of the single union bargaining with a single carrier. This has had the effect of prolonging labor disputes to the detriment of the traveling public and the employee groups. The payments are exacted without regard to those carriers who have had the greatest number of strikes. No incentive within the arrangement exists to encourage reasonable accommodations and peaceful labor relations. To the contrary, the rewards have gone and are calculated to go to those carriers most prone to confrontation labor tactics. This has been at the direct expense of far weaker carriers such as Pan American whose labor relations have been essentially peaceful.* The consequences to the public interest and the employees' interest in a stable U.S. air carrier system and fulfillment of national labor policy have been most adverse.

As the pilot-representing organization on every Pact carrier but one** and the flight attendant representative on twelve Pact carriers, ALPA opposed CAB approval of the Mutual Aid Pact under Section 412 of the Federal Aviation Act, 49 U.S.C. §1382, which required disapproval of the Pact if adverse to the public interest or in violation of the Railway Labor Act. The CAB in 1973 approved the Pact in current form, by a vote of 3-2, against the recommendation of its administrative law judge who called for disapproval of the latest Pact amendments escalating Pact

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* Pan American World Airways has not experienced a strike since August 1969 and has received no Pact benefits since that strike. Yet from the beginning of 1969 to the present Pan American has paid out net Pact benefits totalling $22,815,745. In the first three quarters of 1974 alone Pan American has paid out $5,924,654. See discussion, Point I, *infra*.

** American Airlines.

benefits and annual maximum liability of Pact members. (App. 226a).*

Despite the multicarrier impact of Mutual Aid, all bargaining by ALPA-represented employees is conducted by the employees themselves on a single-carrier basis.

Current Mutual Aid Pact and CAB Response

Based on 1969-1970 amendments, the Mutual Aid Pact currently guarantees to any struck carrier member meeting limited criteria fifty percent of its normal air transport operating expenses for shutdown flight operations, during the first fourteen days of the strike, and additional amounts ranging down to thirty-five percent of normal operating expenses throughout the remainder of the strike. (App. 314a). Every Pact member contributes on the basis of (a) windfall revenue based on a contributor's increased revenue because of the strike and (b) supplemental payments in proportion of the contributor's air transport operating revenue for the prior year to the total revenue for all members, up to a maximum annual supplemental payment liability for each member of one percent of the prior year's operating revenue. There is no provision in the Pact for exempting any member from liability if required by finan-

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* "App." references herein are to the separate Appendix volume. "Tr." references are to transcripts of the proceedings held before the Hearing Examiners (Administrative Law Judges) before the CAB and reproduced with pagination unchanged from the original in the volumes entitled "Exhibits to Joint Appendix," filed in the Court of Appeals. "Ex." refers to the exhibits introduced into evidence by ALPA or the Carrier or Trunk Carrier parties, also reproduced in the "Exhibits to Joint Appendix" volume. References designated "I" are to the 1968 evidentiary hearing; references designated "II" are to the 1971 evidentiary hearing.

cial considerations and a member may withdraw only on a year's written notice. (App. 320a).

The record before the Board demonstrated that these high level of Pact benefits fortified struck carriers' resistance to union demands without leading to any moderation of the demands, thus unnecessarily prolonging labor disputes to the detriment of the public interest in air service. The record also demonstrated that high level of Pact benefits created a strong incentive for struck carrier to prolong a strike for the short term benefits, particularly where the carrier is operating at a loss.* The one percent supplemental payment liability represented a serious financial drain on weak air carriers to the benefit of the financially strong. Payments have gone in large measure irrespective of a carrier's abrasive and disruptive labor policy. See discussion, Point I, *infra*.

Despite these clear defects in the amended Mutual Aid Pact system, the Board's 3-2 majority refused to disapprove the amended Pact. The Board held that the public's interest in avoiding prolonged strikes because of carrier strike profits was not an "appropriate issue," but that the proper issue was "reasonableness" of labor settlements.

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* This is precisely what happened in a flight attendant strike against TWA in November-December 1973. At that time *Honolulu Advertiser*, November 8, 1973 reported the following on the basis of an interview with TWA Board Chairman C. C. Tillinghast: "Oddly, TWA's profits for 1973 will be better off if the strike isn't settled before year end, Tillinghast noted. That's because TWA is receiving income under 'mutual aid' agreements with other airlines. And meanwhile salary, fuel and other expenses have been shut off. Should the strike end now, the mutual-aid income would end and all the expenses would resume. Yet for several weeks, TWA's revenues would be sub-par since reservations fell with the strike news, Tillinghast explained."

The Board then held that U.S. air carriers would not "resist settlement on a reasonable basis. . . ." (App. 234a). With respect to the financial drain of high levels of Pact liability, the Board held that Mutual Aid is a form of insurance and that the "choice of whether to pay what it costs to have such insurance is . . . for the individual carrier to make." (App. 246a). Members Murphy and Minetti, agreeing with Judge Present that the 1969 Pact amendments should be disapproved, stated:

> "The critical point is that under the 1969 amendments a struck carrier's mutual aid benefits can be so generous that it can show an operating profit while its operations are shut down by a strike." (App. 261a).
>
> * * *
>
> "We also agree with the judge—though this in our view is a lesser factor—that the increased liability of participating carriers to pay supplemental benefits under the 1969 amendments poses an unacceptable threat to the financial stability of the paying carriers. As the judge pointed out, the defect of the Agreement's provision for supplemental payments is that it takes no account of the current financial condition of a paying carrier; and, indeed, the bulk of the mutual aid payments since the 1969 amendments took effect have been to otherwise highly profitable carriers from carriers who were currently either losing money or earning less than a reasonable return on investment." (App. 264a).

Earlier Limited Forms of the Mutual Aid Pact and CAB Response

The Mutual Aid Pact began as a highly limited arrangement and has been gradually broadened to increase the pressure on airline unions with continued acquiescence by

the CAB. The original Pact had only six members* and in essence provided that in the event of strikes seeking settlements in excess of or opposed to presidential emergency board recommendation, called before exhaustion of Railway Labor Act procedures, or "otherwise unlawful," a Pact member would receive only windfall payments from the other members. To maximize windfall, the Pact also provided that struck carriers would direct as much traffic as possible to other Pact members. Despite this limited form, however, the plan was clearly an opening wedge in a long-term airline industry labor relations campaign. As later found by the Board's Hearing Examiner,

> ". . . it is evident that one of the motivating factors [for the first Pact] was a dissatisfaction with the operation of the Railway Labor Act in the air transportation industry. The carriers under the leadership of the ATA apparently extensively explored ways and means to rectify the deficiencies which the air carriers believed made it unsuitable for the air transportation industry regardless of its effectiveness in the railroad industry." (App. 82a-83a).

The Board approved this original Mutual Aid Pact under Section 412 of the Federal Aviation Act on the theory that the Pact would promote "freedom from industrial strife" in the airline industry. (App. 10a). The Board disapproved the traffic referral clause intended to maximize windfall payments, but otherwise approved the Pact against antitrust attack and held that its "order of approval would grant immunity from the antitrust laws." (App. 11a-12a).

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* American Airlines, Capital Airlines, Eastern Airlines, Pan American World Airways, Trans World Airlines, United Air Lines.

Thereafter the carriers began their program of amending and broadening the Mutual Aid Pact. In amendments from 1959 through 1962 the Pact was made applicable to almost all strikes against a Pact member. (App. 84a). Four additional carriers (National, Braniff, Northwest, Continental) joined the Pact, extending membership to ten airlines carrying approximately ninety percent of all trunkline traffic in 1959 (App. 43a), and the Pact was continued in effect on an indefinite basis with limited withdrawal rights. Thereafter in 1962 the Pact was again amended to provide for the first supplemental payments feature, which guaranteed that a carrier member would receive twenty-five percent of its normal air transport operating expenses for shutdown flight operations and which provided a maximum annual supplemental payment liability for each member of one-half of one percent of the prior year's air transport operating revenues. (App. 123a). Over dissents of member Minetti and Vice-Chairman Murphy, the CAB in 1964 approved these amendments for three years, finding the recent past had "not been typical either as to the industry, played with the capacity problem, or labor-management relations, preoccupied with the crew compliment issue. . . ." (App. 48a). This was followed by the 1969-1970 Pact amendments doubling supplemental payment liability and opening the Pact to local service carriers for the first time. The Pact as thus amended was approved by the Board in proceedings under review here.

Court of Appeals Proceedings

ALPA and six other labor organizations sought review of the Board's 1970 and 1973 orders approving the Mutual Aid Pact as amended. Two other unions intervened in the

proceedings on the side of petitioners; the trunkline carrier and local service carrier members of the Mutual Aid Pact intervened on the side of the CAB. The Court of Appeals sustained the Board's orders against ALPA's contentions based on the public interest, Railway Labor Act, and antitrust laws. (App. p. iv).

Reasons for Granting the Writ

The chief attributes of the Mutual Aid Pact have been briefly described. These attributes indicate the public interest, labor policy and antitrust issues raised by the Board majority decisions approving the widened Pact. The Pact permits a certificated air carrier to bargain with a single union on the assurance that acceptance of a strike can be more profitable than continued service, and is adverse to the interest of the public whose benefit is paramount in air regulation. The plan enables the carrier to render such or no service as it may choose irrespective of its certificated obligation, so that the Board's decisions allowing the plan to go forward requires scrutiny at the highest judicial levels. The need for review in the present case is compounded by the demonstrated loss of critical working capital to such carriers as Pan American World Airways and United Air Lines; the financial conditions of these and other carriers suggests that the CAB would have better served the public by regulating the industry as required by law rather than approving the Mutual Aid system with no provision for the finances of unprofitable carriers.

The Court of Appeals below was also in a position to scrutinize the Mutual Aid system with reference to Railway Labor Act obligations, for it is the role of the federal

Courts to interpret and apply the RLA in light of the national labor policy. Unfortunately, the Court declined to exercise its responsibilities with reference to labor policy issues raised by Mutual Aid and approved the Pact as a routine instance of economic self-help, on the basis of a Taft-Hartley decision that on analysis has no bearing here. Correctly viewed, however, the Pact does not represent a self-help effort, but is an industry-wide economic effort in the context of single-carrier bargaining relationships. This type of effort is antithetical to our national labor policy of containing labor disputes to the employer who is bargaining over the disputed contract. In addition, what the Court below missed is the large difference between the Taft-Hartley and Railway Labor Act schemes, for the latter statute regulates an employer's economic weapons always with an eye on certificated carrier obligations. But the effect of the Pact, contrary to RLA limitations, is to enable and encourage a regulated air carrier to accept a strike and render such service as will increase Pact benefits—even by shutting down service on monopoly routes.

The Pact exists as an inter-carrier combination with the purpose of jointly containing labor costs; this violates the Sherman Act on its face, for this kind of multiemployer activity is exempted from the Sherman Act only where the employees affected have agreed on multiemployer bargaining. However, the Board holds that it has power to exempt the Pact from the antitrust laws, contrary to the rulings in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963) and *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

These issues, significant as they are, are of double importance by virtue of their industry-wide character. For

nearly the entire United States aviation industry have pooled their resources in the Mutual Aid Pact. The CAB has all but abdicated its regulatory function toward this industry by approving the Pact as amended, and the Court below acquiesced in the Board's failures as if the Mutual Aid Pact were not a case of critical significance for one of the most important industries in the United States. It is respectfully suggested that this Court should rectify the Board's unwillingness to confront the serious dangers posed by Mutual Aid.

ARGUMENT

POINT I

By permitting a carrier to bargain with financial assurance that acceptance of a strike may be more profitable than continued service, widening industrial disputes, allowing an air carrier to render such or no service as it may choose irrespective of its certificated obligations and requiring contributions from all members without regard to ability to pay, the Mutual Aid Pact is adverse to the public interest as defined in the Federal Aviation Act of 1958.

Statutory Framework

Section 412(b) of the Federal Aviation Act of 1958, 49 U.S.C. § 1382, required the Board to disapprove the Mutual Aid Pact and amended Pact if the Pact was found "adverse to the public interest or in violation of this Act. . . ." The public interest objectives mandated by the Aviation Act plainly include the public interest in uninterrupted air

service and the financial well-being of all certificated carriers. See Federal Aviation Act, Section 102, 49 U.S.C. § 1302.

The Adverse Effects of Mutual Aid are Well-Documented

The multiple defects of the Mutual Aid system are well-documented on the record of the case.

1. ***Profit-Making Strikes***

The national labor policy assumes that employee strikes are an available technique for moderating the goals of both parties to a dispute, but the Mutual Aid Pact as amended actually permits a carrier to bargain with a single union with financial assurance that the acceptance of a strike may be more profitable than continued service. The record reveals the remarkable fact as noted by Members Murphy and Minetti that "a struck carrier's mutual aid benefits can be so generous that it can show an operating profit while its operations are shut down by a strike." (App. 261a). As a result, the 1969 amendments produce the actual danger of longer and longer airline strikes. These are the uncontroverted facts found by Judge Present:

> "*National*, although it conducted no operations during the approximately four-month strike by ALEA, with the aid of mutual aid receipts amounting to $27,985,000, earned, during the strike period, net income of $810,000 after $8.4 million in charges for depreciation and amortization.
>
> "*Northwest*, which during the five-month strike by BRAC conducted an average of about 29 percent of its operations, achieved a net profit before income taxes of $17.9 million during the strike period after

deducting $32.8 million in charges for depreciation and amortization. The carrier's mutual aid receipts totaled $47,287,000.

"*TWA* incurred a net loss before income taxes of $879,000 during the two-day strike to which it was subjected in October 1970. That result reflects charges for depreciation and amortization in the amount of $621,000 and mutual aid receipts of $2,452,000. The carrier maintained about 25 percent of its operations during the two days. However TWA estimated that, if it had not suffered the strike, it would have lost $1,687,000 during the two-day strike period, so that the carrier actually gained $808,000 for the period of the strike.

"*Mohawk* received mutual aid for the first quarter of 1971. It conducted no operations during the strike and received no subsidy for that period. Yet, it had a net profit of $29,000 for this quarter after taking into account $1.8 million in depreciation and amortization and $1.4 million in nonoperating expenses." (App. 287a-288a; emphasis added).

Increasing management's capacity to resist union bargaining positions, demonstrated by Pan American's testimony in the 1968 hearing for the pre-1969 Pact, was likewise recognized by the Board as a primary objective of the 1969 amendments. (App. 233a).

The effect of Pact payments on industrial strife is particularly dramatic when a financially weak carrier is involved in a strike. As found by Judge Present:

"It was earlier noted that TWA was financially better off during the two-day strike it incurred in 1970 than if it had fully operated on those days. The really dramatic picture is shown when a weak

> carrier is involved. Thus, for the quarter ended March 31, 1971, the period for which Mohawk received mutual aid, without any operations or subsidy the carrier enjoyed an operating profit of $1,445,000 and a net income after special items of $29,000. In contrast, for the three months ended March 31, 1969, on the basis of its Form 41 reports, the carrier realized from its operations (including $592,000 in subsidy) an operating profit of only $890,000. Furthermore, after special items it suffered a net loss of $421,000." (App. 296a-297a, footnotes omitted).

The Pact as amended has in fact been accompanied by strikes among the longest in airline history. From the Pact amendments through 1972, there were six major strikes on Pact carriers; 119 days, 160 days, 154 days, 115 days, 95 days and 71 days. Northwest's two strikes total 255 days from July 1970—October 1972. Local service carriers Mohawk, Hughes Airwest and Ozark were struck a total of 340 days, a figure previously unheard for regional airlines with the exception of the 1960-1962 Southern-ALPA dispute.* (App. 218a-219a).

2, *Partial Strike-Bound Operations*

Since the Pact has functioned principally in Northwest's interest (App. 298a), and Northwest has likewise pioneered the use of a partial operation and the Pact to maximize its net profit, the 1970 Northwest-BRAC** strike merits special consideration.

Starting in July 1970, Northwest conducted a partial operation throughout the five month strike. At different

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* See *ALPA* v. *Southern Airways, Inc.*, 37 CAB 748 (1962).

** Brotherhood of Railway and Airline Clerks.

times, it sought injunctive relief to prohibit mechanics and pilots from respecting legal BRAC picket lines. In December 1970, the Eighth Circuit actually prohibited pilots from concerted honoring of picket lines. See *Northwest Airlines, Inc.* v. *ALPA*, 442 F. 2d 246 (8th Cir. 1970), *cert. denied*, 404 U.S. 871. This combination of events (1) eliminated effective inter-union assistance while (2) allowing effective inter-carrier assistance through Pact payments to Northwest.

In the absence of any constraint or regulation by the CAB, Northwest itself decided the service which was to be eliminated, in a manner indicating intent to maximize profits and Pact payments, at the expense of the public and its fellow paying carriers, rather than taking action based upon the needs or convenience of the public over its route system.

In pursuing its objectives, Northwest eliminated (1) *virtually all service over its monopoly routes, where no alternative routing was available to the public;* (2) *a large proportion of service over routes which were served by another Pact member from which it would receive windfall and other payments;* and (3) *the smallest proportion of service over routes on which it was competing with airlines which were not Pact members.* These latter were principally long and generally profitable overseas routes also served by foreign carriers. The net effect of this operation was to obtain large Pact benefits, while continuing to obtain revenue from the operations where the competition did not belong to the Pact. (ALPA II, Exs. 1-4). Northwest pioneered in this effort to maximize Pact benefits while continuing to operate. While it did not take ad-

vantage of every opportunity in this regard, it showed how it could be done, thereby providing the model likely to be followed in the future. This pattern of shutdown operations is not consistent with public service requirements.

3. *The Board Responded to the Dangers of Prolonged Industrial Strife in a Manner Totally Adverse to the Public Interest.*

a. Redefinition of the Public Interest; "Reasonable" Settlements

The 1959 Board decision defined the "public interest" in terms of whether the Pact:

> ". . . threatens, by aggravation of labor disputes, to hinder achievement of the objective set forth in Section 102 of the Federal Aviation Act. The public interest which we must guard, though not broadly one of employee welfare, includes attainment of a degree of stability and efficiency in air transportation that freedom from industrial strife will provide." (App. 10a)

As previously discussed, the 1973 Board decision, recognizing the effect of the Pact on negotiations and its intent to increase carrier fortitude in strikes, defined the issue as whether the Pact so shifted bargaining balance "as to create a serious likelihood" of resistance to strike settlements "on a reasonable basis in circumstances where such a settlement was possible", rather than as whether strikes would end more rapidly in the absence of the Pact (App. 233a-234a). In 1973, the Board was willing to accept increased industrial strife if there was no "serious likelihood" that carriers would resist strike settlement on a "reasonable basis"—defined solely by the carrier in its own

self-interest while receiving Pact payments—"in circumstances where such a settlement was possible"—again as defined by the carrier in its own interest while receiving Pact payments.

The Board's redefinition of the issues in terms of "reasonable" labor settlements is an unacceptable claim of authority to decide the terms of labor settlements. Moreover, regardless of Board attempts to define and redefine the standard for determining whether the Pact is "adverse to the public interest" or violates the statute, the prior detailed discussion of the record conclusively demonstrates that the Pact is contrary to the public interest in "freedom from industrial strife", does create a serious likelihood that carriers will resist strike settlements and makes lengthy strikes inevitable.

b. Myth of Promoting Financial Stability

The Board also held that the risk of prolonged strife is outweighed by airline financial stability promoted by inincreased Pact payments. Nonetheless, the 1971 record finally disposed of the myth that increased Pact payments are intended, designed or required to maintain financial stability on struck carriers. Examiner Present found:

> "There is no denying that the higher level of benefits bolsters a struck carrier, but *the Trunkline Carrier Parties have made no showing that an increase in mutual aid benefits was required to maintain the stability of any of the carriers involved in these strikes.* Certainly, the record does not indicate that the 1966 experience established a need for a higher level of payments. As shown in Appendix F, the carriers struck by IAM realized rates of return on investment in 1966 ranging from 7.30 percent by

> Eastern to 21.88 percent by Northwest. National, which did not belong to the mutual aid agreement at the time, enjoyed a rate of return on investment of 15.87 percent. Indeed, it was not until a meeting among pact members held on August 7, 1969, that the proposal was made to raise the 'standard amount'. The record is silent as to the events which prompted this meeting, but the meeting was held during the course of the IBT strike on Western (not then a pact member) and just two days prior to the IBT strike against Pan American." (App. 286a-287a)

The record fully supports these findings, which were not modified by the CAB decision. There was also no effort by the carriers to introduce evidence that increased payments would be likely to be required for financial stability in the future. What the record does show is that these enormous increases were made without any fiscal study (Tr. II 50, 61). Indeed, there was not even any financial analysis of payments which would cover a carrier's actual continuing expenses during a strike with or without a partial operation. Even the expenses to be covered were undefined, except as "the salaries are that you have to pay to your existing employees, the ones you keep on, the rents you have to pay, the interest you have to pay to the banks on your loans, that sort of thing." (Tr. II 56). The results, as set forth above, show that the new payments do not even approximate an attempt to merely cover so called out-of-pocket expenses, *per contra* regularly produce profits for the strike period.

c. Myth of Pressure to Settle Strikes

Rather than confront specific record evidence of profit-making strikes, the Board found that in general carriers are under pressure to settle strikes. But if a carrier is better off by permitting a strike to continue, thus reaping operating profits instead of normal losses, there is no meaningful pressure to settle the strike (See App. 262a). In other respects, too, the Board's effort to discount the danger of profit-making strikes is most unconvincing. Thus, operating profits under the amended Pact would go still higher if the carriers did not take strike losses for "depreciation" of equipment that is not being used and is not substantially depreciating because its useful life is extended by the length of service. The Board's emphasis on "post-strike" losses as discounting strike profits is equally baseless. The Board has never studied the nature or incidence of post-strike losses, and the facts are that many post-strike losses, such as starting-up costs, occur whatever length the strike may take. (See App. 263a).

Finally, it is significant that the Board and Court failed to consider the dangers of profitable exploitation of the Pact through partial strike bound operations, i.e., the 1970 Northwest experience. As the certificate-granting Federal authority, the CAB was and is responsible for preventing the Northwest pattern of evading public obligations for immediate profit. The Board's failure to deal with this issue further indicates that approval of the Pact should be reversed.

4. The Pact Requires Contributions from Members Without Regard to Ability to Pay.

Uncontroverted data demonstrates that the increased supplemental payments required by the 1969 amendments

have been largely received by carriers which did not need support and have been paid by carriers which could not afford to give away large amounts of their working capital. Judge Present properly found:

> "A review of mutual aid data over the life of the agreement again shows that the greatest recipients have been among the relatively more profitable members. Thus, the recipient of the largest amount of mutual aid has by far been Northwest, which has had net receipts of $49,871,000. Yet, in eight of the ten years from 1961 through 1970, Northwest had the highest rate of return on investment of any of the present trunkline pact members. National was the next highest recipient of pact aid, a net of $26,185,000. But, over the period 1961 through 1970, it had the highest rate of return on investment in one year, the second highest in four years, and in only two years was not among the top half of the present group of trunkline members of the Pact." (App. 299a; footnotes omitted.)

Judge Present also found, in the absence of any carrier studies or provision in the Pact taking into account the relative financial conditions of paying and receiving carriers, that the principal contributors have been the weaker airlines and that the contention "that the carriers were able to make the payments called for by the agreement without impairment of their financial condition is hollow." (App. 299a). The 1972 Initial Decision said in part:

> "* * * the highest contributor under the agreement has been United, with net payments in the amount of $28,223,000. United has been in the top half of the ten present trunkline members of the pact only once in terms of rate of return on invest-

ment during the ten-year period reviewed. That was in 1969 when the carrier reached fifth place. The carrier's rate of return on investment over this period did not exceed 9.82 percent and was as low as 0.59 percent. Other evidence of the adverse effect on United of mutual aid is reflected in the carrier's working capital. As of December 31, 1968, United's working capital amounted to $45,994,000. At December 31, 1970, the carrier's working capital totalled $17,520,000. The carrier estimated that if there were no mutual aid agreement its working capital would have been $47,225,000 at December 31, 1970. The next highest payer of mutual aid has been Pan American, in the net amount of $21,846,000. Pan American has been in the top half of the pact members in terms of rate of return on investment, [illegible] in the ten-year period, but since 1963, it has reached the top half only once, fifth place in 1967. The carrier had a negative rate of return on investment in 1969 and a return of only 0.51 percent in 1970." (App. 299a-300a)

Moreover, Pan American has not suffered a strike since a brief five-day work stoppage in August 1969—contradicting carrier allegations that the weakest carriers experience the most strikes. (See App. 262a.) Yet, according to public record Form 41 documents filed with the CAB, Pan American from 1969 through the third quarter of calendar 1974 has distributed Pact payments in the net amount of $22,815,745, including $2,765,029 paid out in the third quarter of 1974 alone. In fact, Pan American's total cash distribution under Mutual Aid for the first three quarters of 1974 alone has been $5,924,654 or approximately fourteen cents per share of common stock outstanding. In return, Pan American has received no Pact benefits since 1969.

The Board sought to sustain the discriminatory impact of the Pact by denominating the Pact as a "form of strike insurance, stating that the choice of paying the costs of this "insurance" is for the carrier to make. On the contrary, the Pact is not a form of insurance. Neither the inception of a strike nor its duration are altogether beyond the control of management. Moreover, the Board, not the carriers, must decide whether the costs of Mutual Aid are not adverse to the public interest. In the present case, the high level of Pact liability coupled with discriminatory impact on carriers with weak finances and peaceful labor relations, required disapproval of the Pact.

POINT II

The Mutual Aid Pact widens the scope of industrial conflict beyond the parties to a dispute and violates limitations on multiemployer action and carrier self-help under the Railway Labor Act.

It is undisputed that the Board was required to disapprove the Mutual Aid Pact if the Pact violates or is inconsistent with the Railway Labor Act, 45 U.S.C. Sec. 151 *et seq.* See Section 401(d)(4), Federal Aviation Act, 49 U.S.C. § 1371. The Board and Court held that it is consistent with the Railway Labor Act for an entire industry to amass its economic strength to fortify the bargaining position of a single struck carrier. These decisions are contrary to established RLA limitations.

The Pact Widens the Scope of Labor Disputes and is Inconsistent with Limitations on Multiemployer Economic Activity Against Employees

The Mutual Aid Pact focuses the economic power of an entire industry against striking employees on a single carrier where all bargaining is conducted on a single-carrier basis, widening the scope of industrial conflict and implicating employers who are not party to the underlying labor dispute. However, national labor policy generally limits the scope of industrial dispute to the employer immediately affected to prevent local or particular disputes from widening into national industry-wide industrial confrontation. It is particularly established that multiemployer economic activity against employees is consistent with national labor policy only where it is a) confined to a multiemployer bargaining unit, and b) protects the multiemployer bargaining group in the face of union action directed at its common front or integrity. *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87 (1957) (*"Buffalo Linen"*); *NLRB* v. *Brown*, 380 U.S. 278 (1965); *New York Mailers' Local 6* v. *NLRB*, 327 F.2d 292 (2d Cir. 1964); *NLRB* v. *Great Atlantic & Pacific Tea Co.*, 340 F.2d 690 (2d Cir. 1965). In no instance may multiemployer actions focus on single-employer bargaining relationships where the employees have refused to consent to multiemployer bargaining.

In *NLRB* v. *Brown*, *supra*, the Court held that a temporary lockout by employer members of a multiemployer bargaining unit in response to a whipsaw strike, when followed by hiring temporary replacements for the strike-lockout period, was not an unfair labor practice, inasmuch as the lockout-replacement combination "was all part and

parcel of the respondents' defensive measure to preserve the multi-employer group in the face of the whipsaw strike." 380 U.S. at 284.

In *NLRB* v. *Great Atlantic & Pacific Tea Co., supra*, the Second Circuit also recognized the limitation on multi-employer action advanced here. There the respondent stores locked out employee members of the Meat Cutters Union in response to a Meat Cutters strike against another store chain. The Court found:

> "[S]ince the Meat Cutters had not, either by word or deed, committed themselves to industry-wide bargaining, the food chains' conduct lost the protective quality which justified the Buffalo Linen lockout . . ." 340 F.2d at 692-693.

Like the multiemployer lockout in *A & P, supra*, the Mutual Aid Pact is an offensive weapon of the carriers for amassing multiemployer strength against employees of a single carrier where no multiemployer bargaining has been established. It is thus inconsistent with the elementary national labor policy confining economic warfare to the parties to the economic dispute. As a tactic for turning a single-carrier brushfire war into an industry-wide conflagration, the Pact should be disapproved under the Railway Labor Act. See also *Kennedy* v. *Long Island R.R.*, 211 F.Supp. 478, 488 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 666 (2d Cir. 1963), *cert. denied*, 375 U.S. 830, where the Court upheld inter-carrier financial assistance in a context where "[m]ulticarrier bargaining of labor demands, referred to as regional and national handling, has been and is (since the Act) the customary method of collective bargaining." 211 F.Supp. at 488. And see *United Trans-*

portation Union v. *Burlington Northern, Inc.*, 325 F.Supp. 1125 (D.D.C. 1971); *Cordova* v. *Bache & Co.*, 321 F.Supp. 600, 607 (S.D.N.Y. 1970).

The Pact Does not Constitute Proper Carrier "Self-Help" in Accordance with the Railway Labor Act.

Under the Railway Labor Act the right of carrier "self-help" is a strictly limited right, to be interpreted in light of the carrier's responsibility to make "reasonable efforts to maintain the public service" during a strike. In *Brotherhood of Railway Clerks* v. *Florida E.C. Ry.*, 384 U.S. 238, 245 (1966), the Court held that a carrier faced with a strike could take responsive economic action in the form of *continuing operations* with replacements, but could only make changes in the collective bargaining agreement of the striking employees if they were "reasonably necessary" to continue the operation. 384 U.S. at 248. It is apparent from the Court's opinion that an employee strike under the Railway Labor Act is not an occasion for unlimited economic warfare, but that any carrier self-help which has the effect of prolonging interruption of regular service is inconsistent with the Railway Labor Act. 384 U.S. at 248, n. 8. This holding is consistent with the comparable concept under the Taft-Hartley Act, where the Court has indicated it is not an unfair labor practice for an employer "to replace . . . striking employees with others in an effort to carry on the business." *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). Yet, one of the principal effects of the Mutual Aid Pact is to provide economic motivation to Pact carriers in order to enable them to continue a strike until management has achieved objectives which could not otherwise be attained.

The Board and Court held that *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477 (1960), precludes judicial limits on economic warfare under the Railway Labor Act. However, self-help rights under the RLA are much more limited than under Taft-Hartley, because of public service requirements. See *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). Moreover, under the Railway Labor Act it is the role of the Federal Courts to give specific content to the broad provisions and concepts of the Act, "'in the way in which the common law has developed.'" *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570, 577 (1971). Finally, the Board's interpretation of *Insurance Agents* is much too broad, for that case only held that the Board may not find that a union slowdown tactics while negotiations are in progress are per se a refusal to bargain in good faith, 361 U.S. at 489.

Administrative and judicial regulation of economic tactics in fact has not ceased with the *Insurance Agents* case. See, *e.g.*, *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963); *NLRB* v. *Inland Trucking Co.*, 440 F.2d 562 (7th Cir. 1971). See also *American Ship Building Co.* v. *NLRB*, 380 U.S. 318 (1965) (White, *J.*, concurring in the result). Rather, as these cases show, employer economic tactics are carefully limited. The Mutual Aid Pact should also be disapproved as a multicarrier combination against single-carrier bargaining units that broadens industrial disputes and enables struck carriers to avoid any public service operations.

POINT III

As a multicarrier combination to control and depress labor costs, the Mutual Aid Pact violates the antitrust laws and is not exempted from antitrust regulation by CAB approval.

The Mutual Aid Pact is a multicarrier effort to control and depress wages and working conditions on an over-all basis throughout the scheduled airline industry, despite historic single carrier bargaining relationships and agreements in all instances. Indeed, the 1973 Board decision expressly relied upon a finding that the Pact gave the member carriers "a greater measure of influence over labor costs than they would have without the agreement." (App. 251a). This multicarrier course of conduct violates Section 1 of the Sherman Act, 15 U.S.C. § 1. As stated by the Court in *Cordova* v. *Bache & Co.*, 321 F.Supp. 600, 607 (S.D.N.Y. 1970) (emphasis added):

> "[A]n essential prerequisite to the legality of such multi-employer combinations with respect to industry-wide wages or working conditions in the existence or prospect of a joint collective bargaining agreement with the union, which all parties concede to be immune from the antitrust laws. * * * Absent such conditions, however, *a combination of employers to reduce their employees' compensation does not share labor's exemption* [under Section 6 of the Clayton Act, 15 U.S.C. § 17]."

The Mutual Aid Pact is not within the category of carrier activity which the CAB has authority to exempt from the antitrust laws under Section 414 of the Federal Aviation Act, 49 U.S.C. 1384. As a joint carrier effort with respect

to labor relations it is quite distinct from route awards, rate making, mergers and similar matters which are fundamental to the Board's statutory authority for regulation of air transportation. See *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

The Court's holding that no consideration should be given to antitrust issues on this proceeding is clear error. The 1969 Initial Decision, part of the proceedings under review in the Court of Appeals, stated as an issue for consideration whether the Agreement will "result in restraints on competition." (App. 167a). The CAB has had full opportunity to consider the antitrust issues implicit in the Pact, and it is the responsibility of the Board, not the airline unions, to marshall evidence with respect to the public interest impact of an inter-carrier agreement. Furthermore, the Pact violates the antitrust laws as a matter of law, leaving no necessity for further development of the record on this issue.

In any event the Court should review the Board's holding, apparently approved by the Court of Appeals, that Board approval of the Mutual Aid Pact "would grant immunity from the antitrust laws." (App. 11). As shown, the Pact is well outside the scope of the Board's exemption power, and it is clearly in the interests of justice to reach this issue at the first opportunity. See *Hughes Tool Co.* v. *Trans World Airlines, Inc., supra.*

CONCLUSION

The issues presented in this case are among the most fundamental aviation, labor law and antitrust issues raised in recent years. They immediately affect an entire industry and will have wide repercussions through American industrial life. For these and the foregoing reasons, it is respectfully urged that the Supreme Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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December 6, 1974

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APPENDIX TO PETITIONS

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-709

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC., *et al.*,
Intervenors.

No. 74-710

AIR LINE DISPATCHERS' ASSOCIATION, *et al.*,
Petitioners,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC., *et al.*,
Intervenors.

APPENDIX TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1214

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

AMERICAN AIRLINES, INC., ET AL
ALLIED PILOTS ASSOCIATION & AIRCRAFT
MECHANICS FRATERNAL ASSOCIATION
FRONTIER AIRLINES, INC.
HUGHES AIR CORPORATION d/b/a HUGHES AIRWEST
NORTH CENTRAL AIRLINES, INC.
OZARK AIR LINES, INC.
PIEDMONT AVIATION, INC.
TEXAS INTERNATIONAL AIRLINES, INC.

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v

No. 73-1229

AIR LINE DISPATCHERS' ASSOCIATION, ET AL.,
PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

AMERICAN AIRLINES, INC.
BRANIFF AIRWAYS, INC.
CONTINENTAL AIRLINES, INC.
EASTERN AIR LINES, INC.
NATIONAL AIRLINES, INC.
NORTHWEST AIRLINES, INC.
UNITED AIR LINES, INC.
PAN AMERICAN WORLD AIRWAYS, INC.
TRANS WORLD AIRLINES, INC.
WESTERN AIR LINES, INC.
ALLIED PILOTS ASSOCIATION AND THE AIRCRAFT
MECHANICS FRATERNAL ASSOCIATION
FRONTIER AIRLINES, INC.
HUGHES AIR CORPORATION d/b/a HUGHES AIRWEST
NORTH CENTRAL AIRLINES, INC.
PIEDMONT AVIATION, INC.
TEXAS INTERNATIONAL AIRLINES, INC.

Petitions For Review of an Order of the
Civil Aeronautics Board

Decided August 8, 1974

Robert S. Savelson, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of

court, with whom *Donald J. Capuano* was on the brief, for petitioner in No. 73-1214. *Patrick C. O'Donoghue* and *Martin F. O'Donoghue, Jr.*, also entered appearances for petitioner in No. 73-1214.

William G. Mahoney, for petitioners in No. 73-1229.

Martin C. Seham, of the bar of the Supreme Court of the United States, *pro hac vice*, by special leave of court for intervenor, Allied Pilots Association and Aircraft Mechanics Benevolent Association. *Richard Hibey* and *James P. Davenport*, entered appearances for intervenors Allied Pilots Association and Aircraft Mechanics Benevolent Association.

Glen M. Bendixsen, Attorney, Civil Aeronautics Board for respondent. *Richard Littell*, General Counsel, Civil Aeronautics Board, *O. D. Ozment*, Deputy General Counsel, *Robert L. Toomey*, Acting Associate General Counsel, Litigation and Research, Civil Aeronautics Board and *Robert B. Nicholson*, Attorney, Department of Justice, were on the brief, for respondent. *R. Tenny Johnson*, General Counsel, Civil Aeronautics Board, at the time the record was filed and *Warren L. Sharfman*, Associate General Counsel, Civil Aeronautics Board, at the time the record was filed, also entered appearances for respondent. *Howard E. Shapiro*, Attorney, Department of Justice also entered an appearance for respondent.

Charles A. Miller with whom *Robert N. Saylor* and *Eugene D. Gulland* were on the brief, for intervenors trunkline carriers.

Raymond J. Rasenberger and *James L. Devall* were on the brief for intervenors, Frontier Airlines, Inc., et al.

Before: BAZELON, *Chief Judge* and MACKINNON, *Circuit Judge* and CHRISTENSEN,* *United States Senior District Judge* for the District of Utah

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Opinion for the Court filed by *Chief Judge* BAZELON.

BAZELON, *Chief Judge*: Petitioners, who are various groups of airline employees, challenge the CAB's approval of the airlines' Mutual Aid Pact, as amended. They contend that the Pact, as approved, violates the national labor policy, the Railway Labor Act (RLA) and the antitrust laws; and that there is no substantial evidence to support the CAB's finding that the Pact is not adverse to the public interest.

I.

Created in 1958 by six airlines, the Mutual Aid Pact represented a joint effort to soften the impact of strikes against individual companies. At its inception, the Pact provided only for "windfall payments." A strikebound company received payments from other Pact members equal to their increase in revenues resulting from the strike minus their added operating expenses in servicing the new business. The Pact was soon amended to provide for "supplemental payments." This feature enabled a carrier member to receive 25% of its normal air transport operating expenses for operations shut down by the strike. A 1969 amendment to the Pact raised that figure to 50% during the first fourteen days of the strike, dropping by stages to 35% after a strike period of four weeks or longer. The additional payments over windfall to meet this allotment were to be contributed by each member in the proportion which its air transport operating revenues bore to the total revenue for all members. Individual carrier liability for supplemental payments was limited at first to one-half of one percent of the carrier's intake for the prior year. That limitation was upped in 1969 to one percent by agreement of the Pact members.

Both the increase in supplemental payments rates and the higher ceiling on individual carrier liability were

approved in the Board's 1973 order,[1] which followed an initial decision by the Administrative Law Judge refusing to allow the escalations.[2] These elements of the amended Pact are the primary focus of the unions' attack on the Board's action. Petitioners also contest the CAB's consent to a 1971 amendment to the Pact authorizing the participation of local service carriers.

II.

The Supreme Court has recognized the responsibility of transportation agencies like the CAB to make decisions consistent with national labor policy. *Burlington Truck Lines v. United States*, 371 U.S. 156, 173. This responsibility was explicitly recognized in the Board's opinion and is not a matter of dispute on appeal. What is in dispute is the substance of national labor policy relevant to this case.

The national labor policy rests on the principle that parties should be free to marshall the economic resources at their disposal in the resolution of a labor dispute, consistent with the specific rights and prohibitions established by the labor statutes. It is not generally given to government agencies to "regulate what economic weapons a party might summon to its aid."[3] And this principle, of course, underlies the RLA, which is made applicable to air carriers by 45 U.S.C. § 181 and by section 401(k)(4) of the Federal Aviation Act, 49 U.S.C. § 1371(k)(4). That Act does establish certain procedures that must be followed in the direct bargaining

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[1] CAB Order 73-2-110, Feb. 27, 1973, Joint App. 268a.

[2] Initial Decision of Examiner Arthur S. Present, Joint App. 271a.

[3] NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 490 (1960).

process,[1] but once these procedures are exhausted without a settlement, either side is free to resort to economic self-help in an attempt to force a settlement most favorable to it.[2]

This is not to suggest that warfare between unions and the airlines may rage uninhibited under the RLA. Like other substantive labor legislation, the RLA imposes a duty on both employers and employees to bargain in good faith,[3] and it recognizes the right of employers to organize without employer interference.[4] But in this case the CAB specifically noted that "the record is replete with evidence of the earnest and consistent good faith efforts of [the Mutual Aid Pact Members] to find a resolution to their strikes throughout the course of difficult labor negotiations."[5] The Board also points to evidence refuting any notion that the Pact functions as an employer device to control the formation of bargaining units.[6]

The permissibility of the Mutual Aid Pact under the RLA is supported by *Kennedy v. Long Island R.R.*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963). The case involved a union attack on a strike insurance plan in the railroad industry, a device whose similarity to the Mutual Aid Pact in the airlines industry was

[1] *See* 45 U.S.C. §§ 154-63, 183-85.

[2] *See* Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378-79.

[3] 45 U.S.C. § 152 First.

[4] *Id.* § 152 Fourth.

[5] Opinion of the CAB, Feb. 27, 1973, Joint App. 240a-41a.

[6] One instance of an alleged RLA violation by an airline is noted, but it was not shown to have any connection to carrier membership in the Pact. *Id.*, Joint App. 241a.

[7] *See id.*, Joint App. 240a n.14.

specifically noted in the Second Circuit's opinion. In upholding the plan, the court began with the principle set out above and found further support for its result in section 20 of the Clayton Act[10] and section 4 of the Norris-La Guardia Act,[11] which sanction the payment of benefits to parties engaged in a labor dispute. Petitioners' efforts to undermine the rationale of the *Kennedy* decision are unconvincing.[12] We find the Board's approval of the Pact, as amended, fully consistent with the national labor policy and the RLA.

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[10] 29 U.S.C. § 52.

[11] 29 U.S.C. § 104.

[12] Petitioners' argument is based in part on a later holding of the Second Circuit, NLRB v. A. & P. Stores Inc., 340 F.2d 690, that a lockout by employers who were not in the same bargaining unit as the company being struck was violative of the National Labor Relations Act. Petitioners urge that this case implies that multiemployer aid is impermissible except in the context of multiemployer bargaining units, which presently do not exist in the airlines industry. *A. & P.* is easily distinguished from *Kennedy* in that the court's result in *A. & P.* turned on a finding that the lockout violated section 8(a)(1) of the NLRA as a device to force the unions to accept multiemployer bargaining units. As we have noted, text accompanying note 9 *supra*, the Pact does not appear to have such coercive tendencies.

The unions also resort to *Brotherhood of Railway & Steamship Clerks v. Florida East Coast R. Y.*, 384 U.S. 238 (1966), which held that during a strike period a railroad could make some alterations in its contracts with the unions without submitting these alterations to the lengthy negotiations procedures required by the Act. The unions attempt to read into this case a principle limiting the use of employer self-help whose effect is to prolong strikes. In fact, the decision vindicates the right of self-help in the face of the technical requirements of the Act by allowing the employer to make adjustments necessary for continued operations during the strike subject only to approval by the district court.

III.

There is no indication either in the initial opinion of the Administrative Law Judge or in the CAB's opinion that the unions presented their antitrust objections to the Pact in the proceedings before the agency. As a technical matter, therefore, we are precluded from considering the antitrust attack absent any reasonable grounds for failure to pursue that attack before the CAB.[13] As a practical matter, we cannot exercise an appellate function in the review of administrative matters unless the problems have been fully aired and focused in the proceedings below. The Federal Aviation Act (FAA) specifically exempts agreements approved by the CAB from the operation of the antitrust laws.[14] The initial forum in which to raise antitrust objections remains the agency which is charged with the primary determination of the public interest.[15]

IV.

In passing on agreements among air carriers under 49 U.S.C. § 1382, the CAB is required to disapprove any

[13] 49 U.S.C. § 1486(e) provides:

> No objection to an order of the Board . . . shall be considered by the court unless such objection shall have been urged before the Board . . . or if it was not so urged, unless there were reasonable grounds for failure to do so.

[14] 49 U.S.C. § 1384.

[15] In prior rulings, the CAB has dealt with antitrust objections to the Pact. *See, e.g.*, Opinion of the CAB, July 10, 1964, Joint App. 44a, 66a-67a. It concluded that the Pact "has not operated in restraint of trade or lessened competition between air carriers . . . ." However, we do not consider these prior rulings, or the findings which they contain, to be proper subjects of review at this juncture. *See* 49 U.S.C. § 1486(a) (precluding appeals from orders of the CAB after 60 days of decision except by leave of court on a showing of reasonable grounds for failure to file in timely fashion).

agreements which it finds to be "adverse to the public interest." The courts may not overturn the CAB's findings of fact unless they are unsupported by substantial evidence on the record.[16] Nor may they upset the final judgments of the CAB unless they fall outside a zone of reasonableness.[17] It is urged, however, that because the CAB lacks expertise in labor matters, its decisions impinging on the activities of unions in the airlines industry are to be accorded less weight than these standards imply, although petitioners fail even to articulate an alternative standard.[18]

The CAB is not a labor board, of course, as it is first to concede.[19] Yet we have already concluded that its decision in this case is consistent with national labor policy, such as it may be discerned. Beyond that, a proper evaluation of the Pact's effect on the unions and their members necessarily involves a firm grasp of industry practices under the agreement, and the CAB's grasp has reason to be firm. Against a background knowledge of the industry's economic structure, the CAB has monitored the Pact since its inception sixteen years ago and has the benefit of three full evidentiary hearings conducted on the Pact in 1962, 1966 and 1970.[20]

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[16] 49 U.S.C. § 1486(e): "The findings of fact by the Board . . . , if supported by substantial evidence, shall be conclusive."

[17] *See, e.g.*, American Airlines, Inc. v. CAB, 98 U.S. App. D.C. 348, 354, 235 F.2d 845, 851 (1956).

[18] Brief for Petitioner Air Line Pilots Ass'n, Int'l at 8-9.

[19] Brief for Respondent CAB at 16.

[20] *Cf.* National Aviation Trades Ass'n v. CAB, 136 U.S. App. D.C. 367, 372, 420 F.2d 209, 214 (1969) (endorsing CAB's competence to make findings relevant to antitrust factors despite its lack of expertise as such in the antitrust field).

Despite the CAB's experience with the Pact, we would not affirm, of course, if issues of employee welfare had been ignored or slighted. This court has previously pointed out "the Board's duty to consider the welfare of carrier employees under the public interest standard when it approves agreements under Section 412."[21] But in a finding that the unions do not dispute, the Board in this case declared

> that the employees retain substantial and effective bargaining power regardless of the Mutual Aid Agreement. Thus, the record shows that air carrier wages . . . are higher than, and . . . have increased faster than, wages in other industries, including other transportation industries.[22]

We do not think the Board need have gone further in this respect.

In assessing the net impact of the Pact and its new amendments, the CAB also took into account, *inter alia*: the industry's vulnerability to strikes; the tendency of the Pact, as amended, to promote or prolong strikes; and the impact which the agreement has on the viability of marginal companies. Since the basis of the CAB's findings on each of these points is vigorously attacked by the unions, we will review in some detail the evidence on which the Board bases its findings.

The Board found that the air transport industry "suffers a greater impact by strike than do other industries, and is therefore more vulnerable to strike[s] . . . than are other industries." The unions claim that this finding is based on a misreading of the testimony of Dr. Herbert R. Northrup of the Wharton School of the University

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[21] Air Line Pilots Ass'n, Int'l v. CAB, 154 U.S. App. D.C. 316, 321, 475 F.2d 900, 905 (1973).

[22] Opinion of the CAB, Feb. 27, 1973, Joint App. 234a-35a.

of Pennsylvania.[23] On our reading of the statement, Dr. Northrup seems quite explicit that airlines—like other service industries in which the ability to stockpile is limited—are particularly vulnerable to strikes and furthermore that they are more vulnerable to strikes than other transportation industries with a higher percentage of freight traffic, which can be stored pending settlement.[24] In defending the peculiar suitability of the Mutual Aid Pact for the airlines industry, the Board did not purport to find that air carriers were more sensitive to work stoppages than *all* other transport industries; nor was such a finding necessary.

The two remaining findings of the Board which come under special fire are: (1) that the Pact, as amended, is not likely to have a serious impact on the willingness of companies to sustain or prolong strikes; (2) that the payments required by the Act do not and are not likely to affect the viability of small or economically marginal airlines. These findings are defensive in nature. They are central to the Board's answer to allegations that the Pact poses risks to the stability and smooth operation of the airlines system which outweigh the benefits on which we have touched. If either finding were unsupported, we would have difficulty in countenancing the Board's decision. But we do not so conclude.

Although the CAB followed the Administrative Law Judge's view that "the record does not establish that any carrier has incurred or prolonged a strike because of the increased level of mutual aid,"[25] it differed from his assessment of a substantial danger that the amended

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[23] Trunkline Carrier Exhibit No. 80.

[24] *Id.* 11-12.

[25] Initial Decision of Examiner Arthur S. Present, Joint App. 301a.

Pact *would result* in significantly longer and more frequent work stoppages. In concluding that this risk was not substantial, the Board noted the relative infrequency with which negotiations in the airlines industry have erupted into strikes in recent years. The statistics cited cover the period from 1968-1971, during at least part of which the new amendments were actually in effect.[26]

The CAB's finding on the prolongation issue is further supported by the Board's determination that significant financial pressures to settle remain on the airlines despite their participation in the Pact. The unions point out that in 1970 some airlines actually experienced operating profits during periods of strike when supplemental payments under the Pact were taken into account. But the Board reasonably believed that in assessing the dynamics of the companies' position during strikes, operating profits should be compared to "normal profits" for a similar period—profits which the company would have enjoyed if it had not sustained a strike. Similarly, it included in its model "post-strike losses." These take in the cost of resuming operations, losses attributable to the absence of advance bookings and "the long-term loss of traffic attributable to the loss of carrier identity in the market . . . ." [27]

Clearly "normal profits" and "post-strike losses" are based to some degree, as petitioners assert, on "speculation and hypothecation," [28] but the absence of certainty does not preclude the Board from making a considered

[26] Ironically, the unions cite the same statistics in their attempts to refute the CAB's findings on the strike prolongation issue. Brief of Petitioner Air Line Dispatchers' Ass'n at 10. This would seem to ignore that the Pact was in effect during the entire period covered by the figures.

[27] Opinion of the CAB, Feb. 27, 1973, Joint App. 236a.

[28] Brief of Petitioner Air Line Dispatchers' Ass'n at 30.

judgment on the best information available. One could wish that the Board had addressed itself to the methodological problems inherent in estimating these loss factors: it simply stated that it considered the companies' figures to have been "reasonably estimated" and adopted them as its own.[29] Yet the unions do not point to evidence that the companies reached their estimates by misguided or meritricious methods. And the CAB did seek to control the risk of error by limiting its approval of the agreement to a period of five years. Thus, if the CAB's "hypothecations" prove wrong, they may be corrected.

The Board also found that the Pact offers no significant threat to the financial stability of its members. Although the Administrative Law Judge reached a different assessment of the risk involved, he believed the record did not "demonstrate that the viability of any carrier has been critically threatened because of the higher level of contributions required under the amended agreement."[30] The CAB reinforced its own evaluation by reference to the amounts paid out by various airlines as compared with strike losses incurred.[31] These statistics cover the period from January 1970 to June 30, 1971, when the new higher ceilings were in effect. The Board concluded, not unreasonably, that the payments are not out of proportion to the gains from the protection offered. The balance of costs and benefits in favor of allowing the agreement was found to be particularly true for financially weak carriers, which stand to lose most

[29] These methodological problems do receive extensive treatment by company experts on the record. *See* Trunkline Carrier Exhibit Nos. 50-52. Presumably these discussions provided the basis of the CAB's acceptance of the estimates.

[30] Initial Decision of Examiner Arthur S. Present, Joint App. 301a.

[31] Opinion of the CAB, Feb. 27, 1973, Joint App. 243a-44a.

from strikes or threats of strike."[12] This line of justification also supports the Board's approval of the 1971 amendment allowing local service carriers to join the Pact, for these carriers, as a group, are likely to be less stable, and therefore more vulnerable to strikes than trunkline carriers.

Of course, the ceiling imposed by the Pact provides some safeguard against oppressive payments. And although liability for windfall payments may bring a carrier's total obligation to more than one percent of its operating revenues, the Board argues correctly that the windfall payments represent no added burden to the company which must pay them, because they represent only profits which the company could not have expected to enjoy absent the strike suffered by its competitor.

We conclude that the findings on which the Board rests its decision are adequately supported and that the result reached is a reasonable one.

V.

We have carefully considered the unions' remaining contentions.[13] We believe that only one warrants discussion. The unions say the CAB erred in failing to adopt a condition that would have precluded consideration of amounts paid out under the Pact as expenses for the purpose of establishing rates. As the CAB recognized,[14] the petitioners are seeking to pursue this issue in the wrong procedural context. The authority of the Board to review and prescribe air carrier rates is ex-

[12] *Id.*, Joint App. 245a.

[13] These include a claim of bias on the part of CAB, which we deem without substantial foundation.

[14] The CAB refused to take evidence on this point. Brief of Petitioner Air Line Pilots Ass'n, Int'l at 72.

ercised in distinct proceedings under the FAA.[35] If the unions feel that the rates charged by the airlines are unreasonable because they include allowances for payments under the Pact, they may institute proceedings before the CAB under 42 U.S.C. § 1482(d). Petitioners suggest that their objection would be "buried" in a rate-making proceeding.[36] If this should happen, and if the unions are so advised, they may seek judicial review.[37]

Affirmed.

[35] 49 U.S.C. § 1482(d).

[36] *See* Brief of Petitioner Air Line Pilots Ass'n, Int'l at 72.

[37] *See* 49 U.S.C. § 1486(a).

APPENDIX B

Six-Carrier Mutual Aid Pact
Order E-13899 (1959)

Opinion of the Board
Opinion of Member Minetti, dissenting

DOCKET 9977
(E-18899)

SIX-CARRIER MUTUAL AID PACT

Decided May 20, 1959

On the basis of the record before the Board and after giving due consideration to the standards contained in the Federal Aviation Act and the Railway Labor Act, basic agreement between American Airlines, Inc., Capital Airlines, Inc., Eastern Air Lines, Inc., Pan American World Airways, Inc., Trans World Airlines, Inc., and United Air Lines, Inc., relating to mutual assistance in the event of strikes, not found to be adverse to the public interest or in violation of the Act and, accordingly, approved subject to conditions.

In the absence of an affirmative showing in the record, the Board is unable to conclude that the agreement violates the Railway Labor Act; that the agreement threatens, by an aggravation of labor disputes, to hinder promotion of a stable and efficient air transportation system; that the agreement, modified by deletion of the provision relating to routing of traffic by a struck carrier, will substantially lessen competition between carriers; that the agreement is too vague for approval or that the parties thereto have failed to comply with the filing requirements imposed by the Board's orders; that subsidy mail-pay considerations require disapproval of the agreement; or that the agreement would inject the Board into the controversial area of labor relations and impose such a complex administrative burden on the Board as to render its approval adverse to the public interest.

Where Congress has been silent on the matter of private efforts by employers to induce acceptance by unions of recommendations of emergency boards established by the President of the United States under section 10 of the Railway Labor Act, the Board will not usurp the congressional prerogative by embroidering additional prohibitions on the fabric of that Act.

Provision in agreement, not essential to basic plan, which requires struck carrier to route traffic to other signatories, unduly restrains competition among air carriers, does not serve the interests of the traveling public, and must be deleted as a condition to approval of the agreement.

Approval of agreement shall in the public interest be conditioned upon deletion of objectionable clause relating to routing of traffic, preservation of rights and obligations under Railway Labor Act, continuation of regular reports, and reservation of question concerning reasonableness of financial provisions of agreement for future ratemaking or other regulatory purposes under the Act.

APPEARANCES:

Guy Farmer, Howard C. Westwood, David C. Acheson, and *Jerome Ackerman* on behalf of American Airlines, Inc., *et al.*

Samuel E. Gates on behalf of American Airlines, Inc.

Charles H. Murchison, Robert E. Hankins, Macon M. Arthur, and *James H. Bastian* on behalf of Capital Airlines, Inc.

W. Glen Harlan, E. Smythe Gambrell, William R. Howard, and *William B. Bell, Jr.,* on behalf of Eastern Air Lines, Inc.

John C. Piric on behalf of Pan American World Airways, Inc.

Carl S. Rowe and *Arthur Wischart* on behalf of Trans World Airlines, Inc.

H. Templeton Brown on behalf of United Air Lines, Inc.

Clarence M. Mulholland, Edward J. Hickey, Jr., James L. Highsaw, Jr., Plato Papps, and *Ivar Peterson* on behalf of International Association of Machinists, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

F. Harold Bennett and *Maurice H. Schy* on behalf of Air Line Pilots Association, International, and Air Line Agents Association, International.

John F. O'Donnell on behalf of Transport Workers Union of America, AFL-CIO.

George R. Petty, Jr., on behalf of Flight Engineers International Association, AFL-CIO.

OPINION

BY THE BOARD:

This proceeding involves an agreement between six certificated carriers [1] for mutual assistance in the event of certain strikes.[2] The carriers seek approval of the agreement under section 412 of the Act.[3]

On December 4, 1958, the Board ordered [4] oral argument on the question of approval or disapproval of the agreement. All interested parties and government agencies were invited to participate in the hearing. Statements of position have been filed by the carriers,[5] unions,[6] six supplemental air carriers,[7] and one municipal chamber of commerce.[8] Responses to Board inquiries have been received from various government agencies.[9] The carriers and unions [10] have further expressed their views during oral argument, and the matter now stands submitted for decision.

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[1] American Airlines, Inc., Capital Airlines, Inc., Eastern Air Lines, Inc., Pan American World Airways, Inc., Trans World Airlines, Inc., and United Air Lines, Inc. These carriers shall be referred to simply as "the carriers," or by their commonly known abbreviated names.

[2] A copy of the agreement is attached hereto as appendix A.

[3] Federal Aviation Act sec. 412 provides:

"Sec. 412. (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

* * * * * * *

"(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it."

[4] Order E-12203, 23 C.A.B. 961.

[5] The carriers filed a joint brief. TWA and Capital also filed supplemental memorandums.

[6] International Association of Machinists, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (jointly); Air Line Agents Association, International; and Air Line Pilots Association, International.

[7] All American Airways, Inc., Air Cargo Express, Inc., d.b.a. Columbia Airlines, Sourdough Air Transport, Southern Air Transport, Inc., Standard Airways, and United States Overseas Airlines, Inc. (jointly urging disapproval).

[8] Louisville (Ky.) Chamber of Commerce (urging approval).

[9] Department of Commerce, Department of Justice, Department of Labor, National Labor Relations Board, and National Mediation Board. The responses of these agencies are set forth in appendix B to this opinion.

[10] International Association of Machinists; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Air Line Pilots Association, International; Air Line Agents Association, International; Transport Workers of America, AFL-CIO; and Flight Engineers' International Association, AFL-CIO. These unions shall be referred to herein as "the unions," or by their commonly known alphabetical abbreviations.

After careful scrutiny of the record before it, the Board has determined to approve the agreement since, subject to conditions,[11] the basic agreement cannot be found to be adverse to the public interest or in violation of the Act. Certain conditions required by the public interest will be included in the order of approval.

I

The agreement, which became effective October 20, 1958, and is to expire 1 year later, provides for mutual assistance in the event any party's flight operations are shut down by reason of (1) a strike called to enforce union demands in excess of or opposed to the recommendations of a Presidential Emergency Board appointed under section 10 of the Railway Labor Act; or (2) a strike called before exhaustion of the pre-strike procedures of that Act; or (3) a strike which is "otherwise unlawful." The operating parties will pay to the strike-bound signatory carrier their "increased revenues attributable to the strike * * *; less applicable added direct expenses." In return, the struck carrier "will make every reasonable effort * * * to provide the public with information concerning all air services rendered by the other parties, and to direct to them as much of the traffic normally carried by the party suffering such a strike as possible * * *"

II

In determining whether to approve the agreement, we are governed by section 412 of the Act, which provides that we shall approve any agreement not found to be adverse to the public interest [12] or in violation of the Act. Since both the Federal Aviation Act and the Railway Labor Act provide that every air carrier, and its employees, must comply with the applicable provisions of the latter statute,[13] our measurement of the agreement against the standards contained in section 412 begins with the inquiry whether the agreement violates the Railway Labor Act.

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[11] As noted hereinafter, the conditions include deletion of clause 2 of the agreement, a severable provision which is not essential to administration of the agreement but which is objectionable to the interests of the public.

[12] Our purview of the "public interest" is framed by sec. 102, which provides:

"Sec. 102. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics."

[13] Section 401(k)(4) of our Act makes compliance with title II of the Railway Labor Act a condition upon the holding of a certificate of public convenience and necessity by any air carrier. Section 201 of the Railway Labor Act extends all the provisions of title I of that Act (except sec. 3) to "every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service."

The unions oppose approval of the agreement on the ground that the agreement will violate the Railway Labor Act in several respects. First, it is contended that "the agreement portends a repudiation of the requirement that collective bargaining be in good faith."[14] We cannot agree. Clearly, such a result is not dictated by the terms of the agreement, which do not impinge upon the carriers' responsibilities "to exert every reasonable effort to make * * * agreements * * * and to settle all disputes."[15] The agreement, although increasing management's abilities to withstand the economic impact of strikes in the same manner that union strike benefits cushion the economic effect on employees, does not purport to affect the carriers' duties under the Railway Labor Act to bargain in earnest. Nothing presented by the parties shows that the operation of the agreement will, in fact, induce the carriers to disregard the obligations imposed by law. Neither matters of record nor fair inferences to be drawn therefrom justify a finding that the agreement will constitute an impediment to *bona fide* collective bargaining.

Similarly, we cannot conclude that the operation of the agreement will interfere with the prompt settlement of disputes. Our view is confirmed by the chronicle of recent events. Thus, although the agreement was operative during a period of major strikes, the record is devoid of any showing that the duration of any dispute was prolonged as a result of the mutual aid provided thereunder. Indeed, counsel for the unions disclaimed any evidence to this effect when questioned at oral argument.

Moreover, experience derived from the recent strikes suggests that there will necessarily be present potent factors precluding carrier complacency around the bargaining table. Strikes compensable under the agreement will continue to cause significant losses of revenue.[16] For example, even after Capital received mutual aid payments of $2,247,972 for October and November 1958 that carrier's net operating revenue for the 2 months in which the strike took place was $1,387,979 less than the carrier would have earned by its own forecast. And, as to expenses, it is noteworthy that payments under the agreement do not recoup a struck carrier's fixed costs, or its extraordinary strike expenses. We are satisfied that the prospect of major losses of revenue and continuing fixed expenses, with possible permanent diversion of traffic to competing carriers, will serve as a genuine carrier incentive to avoid strikes by bargaining in good faith. Accordingly, we reject the union contention to the contrary.

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[14] Among the bargaining duties of carriers are those set forth in sec. 2, first, of the Railway Labor Act, which provides:

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

[15] Railway Labor Act, sec. 2, first, quoted note 14, *supra*.

[16] A substantial portion of the revenue which would have been derived from flight operations by the struck carrier will not be recouped by operation of the agreement. First, not all traffic lost by the struck carrier will be diverted to parties to the agreement; nonsignatory carriers, of course, will not retain their "excess income" due to the strike. This loss of revenue will be increased by the condition attached to our order which prohibits routing of traffic by the struck carrier to other signatory carriers. Secondly, the struck carrier can expect no return with respect to flights over segments not serviced by any party to the agreement. Finally, it is possible that the grounding of an airline will induce a portion of its potential traffic not to travel by air, thus depriving all air carriers, including the struck carrier, of "excess income."

Second, the unions contend that "the agreement violates the duties of air carriers under the Railway Labor Act by bringing into the dispute carriers not parties thereto."[17] In this regard it is argued that the financial aid provisions of the agreement will import the signatory carriers into the "shadowy background" of disputes, aiding the actual parties to seek the bargain desired by the other carriers. We do not agree. Even assuming that the Railway Labor Act precludes group bargaining without union consent, the agreement would not violate that Act unless it burdened the negotiating carrier with representation of positions not its own.[18] This, however, the agreement does not do: The carrier involved in the dispute may bargain without reference to the views or policies of other parties to the agreement; if struck, it is entitled to financial aid without regard to the popularity of its bargaining posture among the other parties. It may well be, of course, that carriers have and under the agreement increasingly will consult with each other concerning labor questions of common concern. Such a practice, however, would not necessarily entail any sacrifice of each carrier's complete and exclusive control over its collective bargaining.[19]

The third manner in which it is contended that the agreement violates the Railway Labor Act relates to its coverage of strikes which have been called "for reasons which include the enforcement of demands in excess of or opposed to the recommendations of a board established by the President of the United States under section 10 of the Railway Labor Act." The unions urge that the agreement is antipathetic to both the letter and spirit of that Act by attempting to force unions to accept emergency board recommendations.

The union position is that the carriers may not by mutual economic aid seek to induce acceptance of board recommendations, which are not made mandatory by the Railway Labor Act. Such concerted carrier action is asserted to be opposed to the congressional contemplation that emergency board recommendations be free of compulsion. To the contrary, the carriers urge that the refusal of Congress to compel acceptance by governmental sanction did not operate to prohibit private parties from attempting to induce compliance by the clash of comparative economic bargaining strength.

The Railway Labor Act is silent on the matter of private efforts to compel acceptance by unions of the recommendations of emergency boards. Nothing in the legislative history called to our attention indicates that Congress intended to forbid a mutual aid pact among employers for that purpose. The Board will not usurp the congressional prerogative by embroidering additional prohibitions on the fabric of the Railway Labor Act. As we have said before—[20]

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[17] The union interpretation of the Railway Labor Act to exclude from disputes carriers not parties thereto rests upon sec. 2, second, of that Act, which provides:
"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

[18] *Cf. Airlines Negotiating Conference*, 8 C.A.B. 254 (1947), where we allowed 18 carriers to set up an organization to act as exclusive bargaining representative of each carrier, although we did not purport to pass upon its propriety as a representative in any particular negotiation.

[19] We express no view whether carrier consultation, which is not shown in the record, would be a desirable or undesirable practice.

[20] *Id.* at 357.

In enacting the Railway Labor Act and in requiring certificated air carriers to comply with Title II of that act Congress has spoken as to the standards of public policy, or public interest, that should apply in the settling of labor disputes between air carriers and their employees. We cannot substitute our opinions for the considered judgment of the Congress * * *.

It follows that the agreement, even if an attempt to obtain union acceptance of emergency board recommendations, will not be disapproved by the Board as in violation of the Railway Labor Act.[21]

In sum, we must conclude that the unions have failed to prove their contentions that the agreement violates the Railway Labor Act. Nonetheless, to underscore our understanding of the agreement and its permissible application insofar as approved by the Board, we shall impose an express proviso that our order shall not affect the rights and obligations of the parties, or of their employees, under that Act. Should the carriers fulfill the union predictions and subvert the agreement in violation of law, aggrieved parties remain free to pursue the same legal remedies which were available prior to our order. We are also aware that our order of approval is not irrevocable, and does not exhaust our powers under the Act to take whatever steps may become necessary to protect the public interest.[22]

III

We next turn to the question whether the agreement threatens, by aggravation of labor disputes, to hinder achievement of the objectives set forth in section 102 of the Federal Aviation Act. The public interest which we must guard, though not broadly one of employee welfare, includes attainment of a degree of stability and efficiency in air transportation that freedom from industrial strife will provide.[23]

The range of our inquiry, however, is limited to a determination of the effect of the agreement upon these statutory objectives. Matters of general policy as to labor disputes are not to be considered by the Board in assessing whether the agreement is adverse to the public interest."[24] It is the function of Congress, and not of the Board, to weigh the wisdom of such agreements as a factor in the furtherance of labor policies not directly related to the promotion of a sound air transportation system.

Accordingly, we must disregard allegations concerning the relative bargaining endurance of the parties, unless the asserted imbalance in labor-management relations poses a threat to the development of a stable and efficient air transportation system. After examining the record, we cannot conclude that the industry has been or, with the agreement, will be afflicted by such a disparity in economic power

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[21] The carriers contend that the agreement should not be interpreted as an attempt to compel compliance with board recommendations. We note that, if such was the purpose, the carriers have nonetheless been singularly unsuccessful in achieving settlements in conformity with the recommendations. Thus, before being struck by IAM, three carriers—Capital, Eastern, and TWA—had all made offers in excess of the pattern recommended by the emergency board, and the actual settlements of these strikes were on terms substantially more favorable to the union than those recommended.

[22] As part of our retention of jurisdiction over the agreement, we shall perpetuate the reporting requirements contained in our previous orders.

[23] *Kent* v. *Civil Aeronautics Board*, 204 F. 2d 263 (2d Cir. 1953), *cert. denied*, 346 U.S. 826; *Western Air Lines* v. *Civil Aeronautics Board*, 194 F. 2d 211 (9th Cir. 1952).

[24] *Cf. F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) (antitrust policy and "public interest"); *American Overseas Airlines* v. *Civil Aeronautics Board*, 254 F. 2d 744 (D.C. Cir. 1958) (labor policy and mail pay "need").

as to jeopardize the attainment of the statutory objectives.[25] The union arguments to the contrary have been carefully weighed and found wanting. First, since the carriers' duties to exert every reasonable effort to achieve prompt and orderly settlement of disputes remains unaffected, we cannot agree that the agreement will destroy effective collective bargaining under the Railway Labor Act. Secondly, we cannot accept the bare, unsupported contention that the agreement will result in an expansion of the area of labor disputes and industrywide strikes. The record before us does not support the inference that the existence of the agreement would persuade unions, as a matter of strategy or of retaliation,[26] to strike against carriers with whom they have no uncompromisable dispute. The mere augury of industrywide strikes, incorrectly predicted under similar circumstances once before,[27] is insufficient to warrant a conclusion that the agreement will destroy workable labor relations in the industry.[28]

IV

In weighing the objections made to the traffic-routing provision of the agreement, we must recognize that our order of approval would grant immunity from the antitrust laws.[29] We have therefore scrutinized the agreement to insure that the conduct thus legalized does not inhibit competition to any significant extent or, if it does, that the restraint is necessary to serve the purposes of the regulatory statute.[30]

After consideration of the contentions of the parties, we have concluded that the clause relating to diversion of traffic by the struck carrier[31] is adverse to the public interest. First, the concerted effort to shuttle traffic among a restricted group of carriers is repugnant to established antitrust principles and should not receive our approval unless required by a serious transportation need, or in order to secure important public benefits.[32] Since the record fails to show any sound public justification for the restrictive provision, we cannot allow it to stand. Secondly, we are convinced

[25] Should subsequent events, including the operation of the agreement, lead to a different conclusion, we would act to preserve the minimum stability in air transportation required by the public interest.

[26] Counsel for IAM-BRC, at oral argument, disavowed any intent on the part of his clients to stage retaliatory strikes.

[27] See IAM and ALPA briefs in Airlines Negotiating Conference Agreements, docket 2603.

[28] The petition of ALAA, dated Feb. 2, 1959, requests exemption of ALAA from the application of the agreement on the grounds that the carrier allegations of imbalance do not relate to ALAA. Viewing the petition as, in part, an anticipatory petition for reconsideration and, in part, a reply brief for which request for leave to file was denied at oral argument, we shall grant the carriers' motions to dismiss. Order E-12263, Mar. 18, 1958; rule 31 of the Rules of Practice in Economic Proceedings. In addition, we note that the specific findings and substantiating evidentiary hearing requested by ALAA are rendered unnecessary by the rationale of our decision. Since we do not approve the agreement in order to redress an alleged preponderance of labor power, the failure of ALAA to achieve equivalent bargaining strength would not entitle it to an exemption from the application of the agreement.

[29] Federal Aviation Act, sec. 414.

[30] Federal Aviation Act, sec. 102(d). *See Local Cartage Agreement Case*, 15 C.A.B. 850 (1952); *Air Freight Tariff Agreement Case*, 14 C.A.B. 424 (1951); *Air Cargo, Inc., Agreement, Petitions*, 9 C.A.B. 468 (1948).

[31] 2. The party suffering such a strike will make every reasonable effort, with its employees still on duty, to provide the public with information concerning all air services rendered by the other parties, and to direct to them as much of the traffic normally carried by the party suffering such a strike as possible, all as the best interests of the members of the public may require."

[32] See *Local Cartage Agreement Case, supra; North Atlantic Tourist Commission Case*, 16 C.A.B. 225 (1952).

that the public interest is not served if the traveling public, unaware of alternative air services which might be preferable, is advised according to carrier obligation rather than passenger convenience.[33]

Recognizing that the provision is not crucial to the purpose of the agreement, we believe sound regulatory practice dictates conditioning our order of approval upon the deletion of the provision from the agreement.[34] We shall require the filing of an amendment to the agreement to conform it to the requirements of the public interest.[35]

If the agreement is so modified, the questions posed by the Department of Justice concerning restraint of trade may be answered favorably to the agreement. First, we are satisfied that the agreement springs from business requirements and not from any intent to monopolize. Secondly, we do not believe that the operation of the modified agreement during the limited period of a strike would seriously affect competition between air carrier parties to the agreement and other carriers. The condition we have imposed will prevent a lessening of competition between air carriers, while surface carriers cannot be deprived of traffic which has already expressed a preference for air service.

Similarly, we cannot conclude that the financial assistance provisions of the agreement will substantially lessen competition within the air transportation industry. The commercial advantages of building goodwill and permanently capturing diverted traffic mitigate against any dampening of competition between operating signatory carriers.

V

The unions have urged disapproval on several grounds relating to the completeness of the agreement and to the contracting parties' responses to our orders. First, the unions contend that the agreement is too ambiguous for approval. We disagree. The carriers were required to file the agreement under section 412(a), whether or not it was legally enforceable.[36] Similarly, the Board is required by section 412(b) to approve or to disapprove the agreement unless it is so vague that the Board cannot intelligently determine whether

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[33] We are aware that several carriers have made the routing obligations more palatable by laying special stress on the proviso "all as the best interests of the members of the public may require." Capital, for example, "in general" prefers signatories only where schedules are "equally desirable"; American, only where "other factors" are "equal." The existence of such practices, however, cannot obviate the grounds for objection to the specific routing provisions of the clause. First, we note that the American and Capital interpretations only underline the ambiguity of the clause, the specific language of which is susceptible to a construction violative of antitrust principles. Needless to say it is not sufficient to avoid such conduct by, *"in general,"* acting differently. Secondly, any attempt by the struck carrier to resolve the factors of product competition—including flight times, routes, number of stops, and quality of equipment—by a vague standard of "equality" must be unsatisfactory to the subjective preferences of the public. In the last analysis, the decision that the nonsignatory carriers offer no advantage to the traveler must rest with the passenger and not with the struck carrier.

[34] By this action, of course, the Board does not intend to modify the obligation of the carriers, as common carriers subject to the public convenience and necessity, to continue to advise the traveling public on a nondiscriminatory basis of all available air service provided by other air carriers.

[35] We have affirmed our power under sec. 412 to attach appropriate conditions to an order of approval, in lieu of disapproval, in *Pan American-National Agreements*, 28 C.A.B. 950 (1958) and *Air Cargo, Inc., Investment, Petitions*, 9 C.A.B. 168 (1948).

The petition of ALPA, dated Feb. 2, 1959, questions our power to so condition our order of approval. The carriers have filed well founded motions to strike the petition as an anticipatory petition for reconsideration, and we shall accordingly dismiss the ALPA petition. Order E-12263, Mar. 18, 1958. In addition, we note that our conclusion disposes of the substantive question raised in the petition and that the issuance of our opinion and order render moot the procedural questions raised therein.

[36] *T.W.A.-Delta, Equipment Interchange*, 8 C.A.B. 857 (1947).

the agreement is adverse to the public interest or in violation of the Act. The agreement, although not definitive in every respect, is still definite. As we have pointed out herein, the plan presented by its terms is capable of measurement against the requirements of the public interest and of the Act. Section 412 requires no greater specificity.

The unions have also argued that the agreement should be disapproved for failure of the parties to file any subsidiary arrangements implementing the agreement, as required by order E-13233, dated December 4, 1958, 28 C.A.B. 964. By that order and by supplemental order E-13308, Dec. 22, 1958, 28 C.A.B. 966, the carriers were required to file such arrangements, if any, or to state that there were none. All carrier-parties have responded to our orders by submitting statements that no subsidiary arrangements have been consummated. Since the record contains no showing that the representations of the carriers are inaccurate, we cannot conclude that there has been any failure to comply with our orders.

VI

The last point upon which we shall dwell relates to the effect of the agreement on the subsidy mail-pay program under section 406 of the Act.[37]

The unions contend that, if subsidized carriers become parties to the agreement, Federal subsidy funds may be used "to try and break a lawful strike * * *." It is urged that payments by subsidized carriers who do not have a subsidy case pending are not subject to Board restrictions; and that payments by carriers having a subsidy case pending at the time of the payment will be difficult to disallow in subsidy computations.

In rebuttal, the carriers contend that the subsidy program will be affected only to a limited extent. Their argument is that payments by a carrier on a closed rate can have no effect; and that payments by carriers on an open rate should properly be allowed as deductions from revenue for the purpose of determining subsidy "need." The carriers contend that such payments merely offset windfall revenue and, by analogy to the allowance of strike losses, should be computed for subsidy purposes.

Upon consideration of the opposing contentions, the Board is unable to find that approval of the agreement will adversely affect the mail-pay program. First, we note that no subsidized carrier is now a party to the agreement. The payments decried by the unions are thus at this juncture wholly conjectural, and may never occur. Secondly, we do not believe that it is either necessary or desirable to

[37] Sec. 406(b) of the Federal Aviation Act provides, in part:

"In fixing and determining fair and reasonable rates of compensation under this section, the Board, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, * * * (3) the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

prejudge in this proceeding the precise treatment for mail-pay purposes to be accorded payments under the agreement. The factors bearing upon a carrier's "need" for subsidy are varied and complex, and can be ascertained only after exhaustive examination of factual data. The record before us contains no more than fleeting references to the general problem. In the absence of any showing that the agreement presents problems incapable of satisfactory resolution in a subsidy case, we are unable to find that mail-pay considerations require disapproval of the agreement.

In keeping with our usual practice in approving agreements under various sections of the Act other than 406, we will provide that the approval granted herein shall not be deemed a determination of the reasonableness of the financial provisions of the agreement for future ratemaking or other regulatory purposes under the Act.[38]

VII

After painstaking review of this matter, we have concluded that the agreement must be approved. Our decision is predicated upon the standards contained in the Federal Aviation Act, and does not attempt to prescribe the most desirable method of adjusting labor-management problems. Congress has not invested the Board with the task of selecting the most salutory approach to labor-management relations; rather, section 412(b) peremptorily commands that "The Board * * * shall by order approve any * * * agreement * * * that it does not find to be adverse to the public interest, or in violation of this Act: * * *"[39] In performing our statutory function, we may do no more than measure the agreement against these standards in order to ascertain whether its effect would be so detrimental as to endanger achievement of the objectives laid down by section 102 of the Act.[40] Within this framework, the Board's order follows from the lack of any affirmative showing that the agreement is adverse to the objectives specified by the Congress. Thus our approval herein does not reflect any determination as to whether the agreement is a wise or beneficial step in the promotion of maximum harmony between labor and management, generally, or in air transportation in particular.

Accordingly, in view of the foregoing and upon consideration of the entire record, we find—

1. That, except as indicated below, agreement CAB 12633 is not adverse to the public interest, and should be approved;

2. That the approval referred to above should, in the public interest, be made subject to the following conditions:

(a) The agreement should be amended by deleting clause 2 thereof, relating to routing of traffic by a struck carrier party;

(b) The approval referred to above shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

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[38] We have also reviewed the union contention that approval of the agreement would inject the Board into the controversial area of labor relations, and impose such a complex administrative burden on the Board as to render approval of the agreements adverse to the public interest. After due consideration, we have concluded that the burden imposed is not sufficiently onerous to compel disapproval of the agreement.

[39] Sec. 412 is quoted in full in note 3 *supra*.

[40] Sec. 102 is quoted in full in note 12 *supra*.

(c) The approval granted herein shall not be deemed a determination of the reasonableness of the financial provisions of the agreement for future ratemaking or other regulatory purposes under the Act.

3. That each carrier-party to the agreement shall file with the Board as amendments to the agreement any subsidiary agreements or arrangements which set forth the actual or contemplated methods for (a) determining when employee demands are in excess of, or opposed to, the recommendations of a board established under section 10 of the Railway Labor Act, when a strike has been called before exhaustion of the procedures of the Railway Labor Act, or when a strike is otherwise unlawful, all as stated in clause 1 of the agreement, and by whom such determinations may be made; or (b) measurement of the increased revenues attributable to a strike and applicable added direct expenses as stated in clause 1 of the agreement; and that, if there are no such agreements or arrangements, each of the carrier-parties shall individually so state. Said parties shall also file a statement of any monies which have been paid pursuant to the agreement indicating the amount paid by each carrier-party and to whom such payment has been made.

4. That any carrier-party which states that no such agreements exist shall file with the Board a complete and detailed statement of (1) any agreements which it may have made with any of the other carrier-parties, individually or collectively, regarding any of the matters specified in ordering paragraph 3, or a statement that there are no such agreements; (2) its understanding of all its obligations under the agreement; (3) its past, present, or contemplated future practices regarding the agreement;

5. That each carrier-party to the agreement shall file with the Board a complete, detailed statement of the bases for each payment made.

6. That each carrier-party which has been, or is in the future, struck shall file with the Board for the duration of each strike a statement containing the following information with respect to revenues and expenses.

(a) An estimate of the dollar amount of operating revenues lost due to cessation of operations;

(b) The dollar amount of payments received under the agreement and, separately, any related tax accruals;

(c) An estimate of the dollar amount of normal operating expenses which would have been incurred to earn the revenues which it is estimated would have been received;

(d) The dollar amount of revenues and expenses of the period as follows: (i) total operating revenues; (ii) total operating expenses; (iii) nonoperating income and expense—net; (iv) special items; (v) Federal income taxes and tax credits; (vi) net income after special items;[41]

7. That each carrier shall continue to file monthly reports of all the information required to be filed by ordering paragraphs 3

[41] The data furnished pursuant to subparagraph (d) above shall be in accordance with the accounting and reporting provisions of part 241 of the Economic Regulations and exclusive of any payments received under the terms of this agreement.

through 6 of this order, until further order of the Board; that negative reports shall be filed by each carrier as to each item for which, during the reporting period, there has been no change from the preceding reporting period; and that such continuing reports shall be filed not later than the 15th day of the month next following the month for which data are reported;

8. That the approval granted herein shall be conditioned upon the filing, within 30 days of service of this opinion and accompanying order, of an amendment to the agreement in conformance with this opinion and order;

9. That the petitions of Air Line Pilots Association, International, and Air Line Agents Association, International, dated February 2 and 12, 1959, should be dismissed.

An appropriate order will be entered.

Durfee, Chairman, Gurney, Vice Chairman, Denny and Hector, Members of the Board, concurred in the above opinion. Minetti, Member, filed the following dissenting opinion.

MINETTI, *Member*, dissenting:

I cannot agree with the majority that this mutual aid agreement is neither adverse to the public interest nor in violation of the Federal Aviation Act of 1958.

Under the Federal Aviation Act of 1958 (the Act), this Board cannot approve any agreement between carriers which offends the Railway Labor Act or the public interest on which it is based, since air carrier certificates, under the Act, are conditioned on continued compliance with the Railway Labor Act. Since this agreement tends to make the collective bargaining process of the Railway Labor Act impotent, the agreement cannot be approved by this Board.

The Railway Labor Act envisages the mandatory practice and procedure of collective bargaining as the only feasible method of preventing work stoppages in essential transportation. In sharp contrast, because of the coercion it imposes on labor during and subsequent to the statutory negotiating periods, *this agreement will destroy the practice while retaining the procedure of collective bargaining*. From the unfortunate opening declaration of hostilities,[1] through the provisions for enforcing Presidential Emergency Board recommendations, the agreement is premised on a proposition repugnant to the Railway Labor Act; namely, that labor-management disputes can only be resolved through the use of concerted economic force.

The damage which this agreement does to the statutory processes of the Railway Labor Act is clear from the agreement itself and from the limited factual information available to us. Even if we

[1] "WHEREAS, the parties and other airlines *are facing or faced with the threat of extreme and unreasonable demands* made by representatives of certain of the classes and crafts of their employees, as exemplified by the current dispute between certain of the parties and their mechanics and related employees, represented for the purpose of collective bargaining by the International Association of Machinists, AFL-CIO (hereinafter called IAM), a controversy in which IAM has rejected and shown an utter disregard for the recommendations of the Emergency Board 122 appointed by the President of the United States to investigate said dispute and has struck Capital Airlines and threatened to strike other carriers for their *insistence upon substantial compliance with the terms of said recommendations*, which action of the IAM tends to undermine the influence, position and integrity of such Board and is destructive of the collective bargaining process; * * *" [Emphasis added.]

assume that our current information does not unequivocally establish the illegality of the agreement, an assumption which I cannot make, the majority's failure to require an evidentiary hearing in order to explore the critical issues raised by this agreement is totally inconsistent with the Board's statutory obligations and is equivalent to an abuse of regulatory discretion.

The Railway Labor Act,[2] like related statutes which form the basis for our national labor policy,[3] is predicated on the faith which Congress has placed in the ability of labor and management to resolve their disputes through sincere efforts to reach an agreement. It seeks to protect the public interest inherent in uninterrupted common-carrier service by promoting a peaceful, friendly approach to labor-management disputes.

Every feature of the Railway Labor Act is aimed either at creating favorable conditions for the conduct of collective bargaining or at prohibiting obstacles to its successful accomplishment. Thus, the Railway Labor Act guarantees to employees the right to organize and bargain collectively through representatives of their own choosing, and provides, in the essential 1934 amendments,[4] the means for compelling compliance with its provisions.

Stated in another way, the Railway Labor Act promotes genuine collective bargaining and, consequently, labor peace, by nullifying the imbalance in bargaining power, between employer and employee, which economic concentration had produced. Not only does the statute protect the employee's right to organize for bargaining purposes but, in addition, it *requires* management to confer in good faith with employee-elected representatives, a compulsion without which the right to organize and bargain would be an empty one.

The necessity for this compulsion is clear. As the National Mediation Board has stated, "there can be no effective right to organize if it is to be enforced only with economic power."[5] For these and

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[2] "The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretations or application of agreements covering rates of pay, rules, or working conditions."

[3] National Labor Relations Act, 29 U.S.C.A. § 151:

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

* * * * * * *

"It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

[4] Act of June 21, 1934, 48 Stat. 1185. In the words of Federal Coordinator of Transportation Eastman, a proponent of the legislation, the amendments were intended "to perfect what has been done" in the Railway Labor Act of 1926. (Senate Hearings on S. 3266, 73d Cong., 2d Sess., p. 10.)

[5] "Administration of the Railway Labor Act by the National Mediation Board, 1934-1957," p. 3.

other reasons,[6] then, the Railway Labor Act is an employee-protection statute as well as an overall plan for labor peace. Since both objectives are designed to be realized through genuine, good-faith collective bargaining, the emasculation of the bargaining process inherent in this agreement is adverse to the objectives of the Railway Labor Act.

To insure the attainment of its objectives, the Railway Labor Act commands the parties to major disputes to take the following preliminary steps, without which no agreement could be reached, and freezes the use of economic weapons during those steps.[7] First, the Railway Labor Act requires direct bargaining between the parties in a good-faith effort to adjust their differences. Second, when bilateral efforts to reach agreement have failed, on request of either party or on proffer of services by the National Mediation Board, the National Mediation Board will act as mediator, or counselor, to both parties to the dispute. Third, in the event of continued failure by the parties to reach agreement after mediation, the National Mediation Board must make every effort to induce the parties to submit their controversies to final and binding arbitration. Finally, where either of the parties declines to arbitrate and the National Mediation Board is of the judgment that an unadjusted dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service,"[8] the National Mediation Board must notify the President, who in his discretion may create an Emergency Board to investigate and report on the facts of the dispute.

Examination of this agreement reveals it to be contrary to the collective bargaining objectives of the Railway Labor Act in two fundamental respects. One, it imposes compulsory multiemployer bargaining without employee consent. Two, it substitutes reliance on economic force for the good-faith bargining required by the Railway Labor Act.

MULTIEMPLOYER BARGAINING

Whether the majority considers multiemployer bargaining desirable or undesirable, its review of this agreement is circumscribed by the prohibition of the Railway Labor Act against the imposition of multiemployer bargaining on unwilling employees. This the National Mediation Board has found.[9] Moreover, the language of the statute permits no other reasonable construction and the statutory prohibition has been recognized by airline spokesmen.[10]

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[6] While the Railway Labor Act prohibits unfair labor practices by employers, no comparable restraints are imposed on employee activity. The only significant employee duties in the Railway Labor Act apply equally to employers.

[7] From the time of the notice of intended change in agreements which sets the Railway Labor Act's machinery in motion, no change may be made in status quo with respect to rates of pay, rules, or working conditions for (1) 10 days after negotiations have collapsed and the services of the National Mediation Board have not been utilized; (2) for 30 days after notification by the National Mediation Board, if its services have been utilized, that its mediatory efforts have failed; or (3) in the event of establishment of an Emergency Board, for 30 days after the report to the President.

[8] Sec. 10, Railway Labor Act.

[9] National Mediation Board, 6th Annual Report, pp. 4, 5.

[10] See statements of Mr. Tipton, then General Counsel for the Air Transport Association of America, in informal hearing on agreement CAB 530, transcript, pp. 56-63.

The wisdom of this prohibition is apparent. Any tendency to hinge the entire operation of the Nation's airlines on the success of a single negotiation increases the danger of a nationwide transportation paralysis, particularly where the expanded scope of negotiation is involuntary. Certainly, where multiemployer negotiations are compulsory, the change in relative economic bargaining strength, as well as the hardened attitudes which compulsion produces, can entirely frustrate not only the machinery but the very purposes of the Railway Labor Act. Ironically, I might add, where one carrier negotiates for the industry, an industrywide work stoppage might well occur, even though a threatened work stoppage on the routes of that carrier alone would not justify the creation of an Emergency Board.[11]

Past experience with the Airlines' Negotiating Committee, a bargaining agency for the industry established in 1945, illustrates the dangers of compulsory multiemployer bargaining. That committee unquestionably prevented an early settlement of a wage dispute between the Air Line Pilots Association on the one hand and American and TWA on the other. Although the Air Line Pilots Association had accepted a National Mediation Board proffer of arbitration, both carriers declined, demanding that negotiations be conducted on an industrywide basis through the Airlines' Negotiating Committee. The result was both unfortunate and unnecessary. As an Emergency Board noted:[12]

> The Airlines' Negotiating Committee agreement was approved by the Civil Aeronautics Board under section 412 without an evidentiary hearing. Such a hearing would have revealed that prior to Board approval, the Committee attempted to force industrywide bargaining on the pilots.

In spite of this earlier experience, and in the face of the available facts which point to compulsory multiemployer bargaining, the majority has blindly approved the mutual aid agreement before us without attempting to explore or resolve the strong likelihood that multiemployer payments to a negotiating carrier constitute the price for multiemployer representation.

Certainly the ultimatum[13] issued by Capital to the International Association of Machinists (Machinists) on October 22, 1958, 2 days

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[11] Not all air transportation work stoppages affect essential transportation. *Note, for example,* the 108-day Western Airlines strike in 1958, where the National Mediation Board declined to call for the creation of a Presidential Emergency Board. Other situations can be envisioned where, because of unaffected competitive services or the limited service scope of the struck airline, a work stoppage would not affect essential transportation.

[12] Emergency Board Report, July 7, 1946.

> " * * * the mediation and arbitration policies of the *Railway Labor Act did not have a fair chance to work out their peaceful and amicable results because of the controversy over industry-wide bargaining.* Had this dispute been handled promptly when it arose in the summer of 1945, it might well have been settled before the question of joint bargaining became acute * * *"

[13] See Washington Post and Times Herald (Oct. 23, 1958):

> "Negotiations to settle the Capital Airlines mechanics' strike collapsed yesterday as both sides in the dispute took an *increasingly hostile attitude.*
>
> "Hopes for an early resumption of operations by the Washington-based airline faded in the *face* of these developments:
>
> "*Capital issued an ultimatum* to the 2474 striking members of the International Association of Machinists and scaled down its offer of wage increases by one cent an hour for every day the strike continues.
>
> "*The union angrily rejected the ultimatum* and branded it as 'insulting.'
>
> "Federal Mediator Francis A. O'Neill said the two sides had 'agreed to disagree' and the negotiations were stalled on 'dead center.' He said there was no point in continuing the conference."

subsequent to the effective date of this agreement and prior to the date on which it was filed with the Board, requires an examination. From the context of statements made by the president of Capital to us on October 21, 1958, it is reasonable to assume that the ultimatum was issued on behalf of other airlines as well and in reliance on the economic strength furnished by this agreement.[14] If, because of this agreement, the hostile attitude displayed by the parties at the time of the Capital ultimatum (an attitude in sharp contrast to the forebearance and absence of bitterness noted in Emergency Board Report No. 122),[15] will continue in the future, the purposes of the Railway Labor Act will be entirely frustrated.

In the majority's view there is no evidence whatsoever that any work stoppage was prolonged because of this mutual aid agreement or the attitudes engendered by it.[16] The majority also points to the ultimate settlement of the dispute between Capital and the Machinists on terms favorable to the employees as evidence of the innocuousness of the agreement and its inability to enable carriers to hold out longer.[17] The latter argument, of course, seems somewhat inconsistent with the former. But whether or not the agreement prolonged the Capital strike, and it appears that it did, the Railway Labor Act is concerned with prevention of work stoppages, and not with the settlement of disputes on terms particularly favorable to either side. In fact, one of the basic difficulties with this agreement, as with the earlier Airlines' Negotiating Committee agreement, is the tendency to make belligerents of negotiators. The almost inevitable result of the hostile attitudes produced by such agreements is the ultimate concession by one party, after a work stoppage, to terms highly favorable to the other party.

The Railway Labor Act, in contrast, contemplates the complete avoidance of work stoppages through mutual agreement, rather than the ultimate surrender of one side to the other. It is noteworthy that, while the carrier parties to the negotiations reported in Emergency Board No. 122 were preparing for all-out conflict, the Machinists and United sat down, in an atmosphere of mutual confidence and trust, and worked out an agreement satisfactory to both sides[18] without a work stoppage and the consequent public inconvenience. Similar preparation for peace might have avoided the Capital work stoppage as well.

EFFECT ON THE DUTY TO NEGOTIATE

On its face, it is evident that reliance by the carriers on their combined economic power to enforce Emergency Board recommendations, instead of the good faith bargaining required by the Railway Labor Act, will violate that statute.

As previously indicated, negotiations in good faith are essential to the success of the statutory plan. In the language of a recent

[14] Transcript of Board conference with President Baker, Oct. 21, 1958, pp. 13, 14, 15, 16, 20.
[15] Report No. 122, p. 178.
[16] Majority opinion, p. 171.
[17] Majority opinion, p. 173, note 21.
[18] Oral argument transcript, pp. 127-129.

decision,[19] "Such compliance (with the mandatory bargaining provisions of the Railway Labor Act) cannot be merely perfunctory. 'Good faith exhaustion of the *possibility* of agreement is required to fulfill it.'" [Emphasis added; footnote omitted.]

The National Mediation Board, in the past, has deplored the lack of maturity in air transport employer-employee relations, as evidenced by the frequent failure of the parties to resolve issues in good-faith negotiations prior to mediation.[20] Yet, in the negotiations current at the time of execution of the agreement before us, no carrier,[21] with the exception of Eastern,[22] made any counteroffer until after the Emergency Board proceeding.[23] Despite the absence of early good-faith bargaining, a fact which was noted with concern by the Emergency Board,[24] the carrier parties to this agreement characterized all requests made by labor, as well as those yet to be made, as "extreme and unreasonable." Whether the carriers had agreed to make no counteroffers, as was suggested in oral argument,[25] and whether any such pact laid the foundation for the instrument now before the Board, is impossible to determine from the meager information currently available to us. It is clear that any aggravation of the present tendency to defer genuine collective bargaining until a work stoppage is imminent will seriously impair the collective-bargaining process.

It is clear, too, that this agreement will produce that result, since the incentives offered by the agreement do not become operative until the preliminary steps required by the Railway Labor Act have been exhausted, *procedurally* (though not substantively), and until an Emergency Board has issued recommendations. The purpose of the agreement is to provide the combined economic power to enforce settlement of labor disputes on *whatever* terms an Emergency Board may recommend. The agreement thus aims at perpetuation of the tendency to defer bargaining until the issuance of an Emergency Board report, since its only effect on present bargaining practices is to make them more attractive.

This increased use of Emergency Board recommendations as a carrier's first counteroffer is an unequivocal violation of the bargaining mandate of the Railway Labor Act, since the statute requires good-faith bargaining *before* the creation of an Emergency Board. No carrier can know, during the negotiating period which precedes the establishment of an Emergency Board, what recommendations an Emergency Board will make or even if the creation of an Emer-

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[19] *American Airlines, Inc. v. Air Line Pilots Association*, 43 L.R.R.M. 2402 (Dec. 12, 1958).

[20] "Administration of the Railway Labor Act by the National Mediation Board, 1934–1957," p. 14.

[21] The negotiations concerned involved 6 airlines and the International Association of Machinists. Three of the airlines, Capital, Eastern, and TWA, are parties to the agreement under discussion. Of the 6, only Capital suffered a work stoppage. Agreement has now been reached by International Association of Machinists on the one hand and each of the 6 airlines on the other. The terms of the agreement are, of course, unknown to this Board. The reasons why National, Northeast, and Northwest have declined to become parties to this mutual aid agreement have not been furnished to the Board.

[22] Eastern offered substantially less than the amount recommended by the Emergency Board; oral argument transcript, p. 127.

[23] Oral argument transcript, pp. 126–127.

[24] See Emergency Board Report No. 122, p. 9: "We regret and deplore the fact that there was not more effective bargaining on wages prior to the creation of this Board."

[25] Oral argument transcript, pp. 126–127.

gency Board will be recommended. As a practical matter then, the carrier cannot freely bargain in good faith if it intends to rely on Emergency Board recommendations, since it would thereby risk offering its employees more than the Emergency Board will ultimately recommend. The absence of good-faith bargaining during this period, however, is in flat violation of the Railway Labor Act. The result is well described in language of the National Labor Relations Board which has said: "Where negotiation is not entered into in good faith, where there is no real give and take, there is no collective bargaining." [26]

The majority argues that, since the mutual aid agreement does not entirely insulate a struck carrier against loss, ample incentive will remain for each carrier to bargain freely and earnestly during the periods designed for that purpose. The reasoning would be more impressive were it not for the fact that the carriers, heretofore, have been reluctant to engage in genuine bargaining until the eleventh hour. Since contemplation of unrecompensed total loss, in the event of shut down, did not deter the carriers from engaging in such poor bargaining practices in the past, the financial security offered by this mutual aid agreement can only reduce the incentive to bargain.

To evaluate the full impact of this agreement on future collective bargaining, it is imperative that we know all the circumstances under which it will be effective. Obviously, if the carriers can invoke this agreement during *any* strike, the threat to the continued existence of genuine collective bargaining in the air transport industry will be considerably heightened.

Looking at the precise terms of this agreement, we find it operative in the event of a strike: (1) called for reasons "which *include* the enforcement of demands in excess of or opposed to the recommendations of a board established by the President of the United States under section 10 of the Railway Labor Act and applicable to such party" [emphasis added]; (2) "called before the employees on strike shall have exhausted the procedures of the Railway Labor Act," or (3) "which is otherwise unlawful."

The judicial remedies which the carriers gratuitously commend to the unions in the event that carrier practices exceed the scope of this agreement are available also to the carriers in the event of strikes called for reasons outlined in (2) and (3) above. We have been furnished with no reason [27] for believing that these judicial remedies, if adequate for the employees, will not be adequate to protect the carriers against unlawful employee activity. If the remedies are inadequate, the cure lies in corrective legislation and not in the vigilante activity inherent in the agreement.

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[26] Written Trade Agreements in Collective Bargaining; N.L.R.B. Bulletin No. 4, November 1939, p. 13.

[27] Transcript, pp. 95, 96. One possible explanation appears in the uncompleted oral argument discussion of the American strike and its relationship to this agreement; a perhaps unintended implication exists there that unlawful strikes are those which have not been judicially declared to be lawful. Another explanation may lie in the possibility that a determination of illegality by an airline or airlines, under this agreement, does not, like a judicial determination, have for its purpose the prevention of strikes but the ultimate settlement of strikes on preconceived terms.

As urgently as the actual operation of provisions (2) and (3) above need evidentiary explanation, the most objectionable is provision (1) which relates to Emergency Board recommendations. For the effect of the word "include" in (1) is to make *the agreement operative in any strike affecting any of the carrier parties.* It may be invoked in aid of an employer whether or not (a) the employer has exhausted the remedies of the Railway Labor Act; (b) an Emergency Board has been established; or (c) the employer will himself accept the Emergency Board recommendations. This mutual aid agreement, then, in threatening economic warfare unless employees accept any and all Emergency Board findings, amends the Railway Labor Act's statutory plan in a manner which, from an employer's point of view, is just as effective as the elimination of the statute. This agreement has from an employer viewpoint all of the advantages of compulsory arbitration with none of its disadvantages; while Emergency Board recommendations will in contemplation be economically binding on employees, the carriers under the terms of the agreement will be under no compulsion to accept them.[28]

While it might be argued, for example, that the absence of payments to American, for the period of its strike, proves that the agreement will not be operative in any and all circumstances, this argument in my opinion is unpersuasive. As hereinabove indicated, under the letter of the agreement, the right to payments is not confined to circumstances specifically enumerated. Moreover, it is highly probable that if American is to continue a party to the agreement, it will be paid subsequent to the issuance of this opinion. In any event, since the threat of this agreement hung over the recent negotiations between American and its employees, the agreement was operative whether or not American will be paid.

The naked question presented then is whether this Board will approve the agreement even if operative in any strike, no matter how it is motivated, or whenever it occurs. The majority, in pointing to the legal remedies which were available to unions prior to the entry of this order,[29] answers the question in the affirmative. It is difficult to understand, however, how remedies which are inadequate for carrier purposes will suffice to safeguard the interest of employees, let alone the public, in the event of carrier activities which violate the Railway Labor Act. Aside from the differences in the nature of judicial relief which must be obtained, employees vis-a-vis employers, in the event of violation of the Railway Labor Act,[30] the employees, because of the majority's approval of this

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[28] Acceptance of all Emergency Board recommendations would be the near equivalent of agreeing to compulsory arbitration, a process to which the carriers as a whole do not appear to be attracted. See American Aviation, Feb. 23, 1959, p. 37:

"Constructive discussions, but little chance of action, seems to sum up Labor Secretary Mitchell's recent airline labor meeting. Management asked amendments to Railway Labor Act—secret ballot in strike votes, ban on jurisdictional strikes, time limit on length of mediation, no secondary boycotts. Airline labor leaders want no changes. Some carriers favor compulsory arbitration, but majority oppose it, as do unions. Congressional action on amendments is very unlikely this year. Airlines give higher priority to working out some form of group bargaining with unions."

[29] Majority opinion, p. 172.

[30] The carriers' remedy in the event of failure to negotiate in good faith is injunction. (*American Airlines, Inc.* v. *Air Line Pilots Association, supra.*) Employees, on the other hand, must obtain a decree compelling specific performance of the carriers' statutory obligations. (*Virginian Ry.* v. *Federation*, 300 U.S. 515 (1937).)

agreement, may well be required to pursue their remedies with this Board before judicial relief is granted.[31] If so, at least some question arises as to whether the majority's action has immunized carrier activity under the agreement from immediate or ultimate redress by the employees under the Railway Labor Act, prior to specific Board disapproval.

Whatever the employees' remedies may be, we cannot approve this agreement as not in violation of the Federal Aviation Act, the Railway Labor Act, or the public interest in either, if it permits, encourages, or results in carrier activities which violate either statute. Under our authority, it is not enough to say that the employees have ample remedies in the event of unlawful carrier activity. We are *without power to approve* any agreement between carriers which has resulted or will result in unlawful activity. In the absence of information responsive to the many questions arising under this agreement, we must disapprove it.

"SAUCE FOR THE GOOSE"

Neither the carriers nor the majority concede that a transportation necessity must be established before this agreement can be approved. I, on the other hand, do not concede that there can be a transportation justification for an agreement which is so clearly repugnant to the purposes of the Railway Labor Act.

This issue needn't be resolved in view of the antitrust law implications inherent in the agreement, implications which have always, in this Board's view, required affirmative justification.[32] Such questions are always present where competitors agree to share excess earnings. Sharing profits with a competitor, like playing marbles "for fun" rather than "for keeps," is entirely inconsistent with the concept of vigorous competition between rivals. The carriers have been certificated to compete with, not subsidize each other. Air carrier subsidy, if necessary, will be granted by the Government as provided by Congress in section 406 of the Act.

In spite of the need for justification, no transportation necessity has been established. The carriers assert that since unions provide economic assistance to each other during strikes or lockouts, the maxim "sauce for the goose is sauce for the gander" provides the equity for comparable mutual aid among carriers. But we have no evidence of assistance given by other unions to the Machinists in the strike against which this agreement was first directed. The only assistance to the Machinists in the Capital strike was the payment of $10 per week out of their own strike fund.[33] That assistance neither furnishes the economic strength to prolong a strike nor justifies the payment of huge sums to a struck carrier to enable it to resist employee requests. To state the proposition is to reject it.

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[31] *Cf. Brotherhood of Railway, etc. v. Railroad Retire. Bd.*, 239 F. 2d 37 (1956).

[32] *Cf.* Majority opinion, p. 175; see also *Isbrandtsen v. United States*, 211 F. 2d 51, 57 (D.C. Cir. 1954):

"* * * the agency entrusted with the duty to protect the public interest (must) scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws *any more than is necessary to serve the purposes of the regulatory statute.*" [Emphasis supplied.]

[33] Oral argument transcript, p. 142.

"THE RECORD"

The majority blindly denies that the foregoing clear indications of violation of the Railway Labor Act unequivocally establish the agreement's illegality. Accordingly, the majority is forced to reconcile its grant of approval with discharge of its statutory investigative duties by a three-step reasoning process. First in its "painstaking review"[34] the majority leans heavily on the failure of "the record" to provide unequivocal evidence of illegality. Second, the majority states that the Board *must* approve agreements under section 412 of the Act, in the absence of facts which affirmatively and unequivocally establish the agreement as in violation of the Act. Third, in recognition of the factual deficiencies of "the record," the majority imposed various conditions to its approval of the agreement.

Plainly, there is no "record" in this proceeding, nor can the transcript of oral argument be reasonably so designated. Oral arguments neither resolve, nor are they designed to resolve, factual questions. Since the majority argues that this agreement *must* be approved in the absence of facts which affirmatively and unequivocally establish its illegality a refusal by the majority to provide an opportunity for evidentiary development of those facts is indefensible. Further, no one can argue that action on the agreement could not await more precise administrative fact-finding processes since section 412 agreements do not require approval prior to effectuation.

To assert that we must immediately approve agreements between carriers in the absence of affirmative facts clearly establishing illegality not only rules out the evidentiary process for section 412 agreements, but conflicts, as well, with past attitudes toward the review of those agreements. We have repeatedly asserted that "Where an agreement has * * * elements which are plainly repugnant to established antitrust principles, approval should not be granted *unless there is a clear showing that the agreement is required by a serious transportation need, or in order to secure important public benefits.*"[35] [Italic supplied.] I can see no reason for maintaining that a clear showing of illegality must be made by opponents of an agreement in one instance, and a clear showing of necessity must be made by proponents in another. If the difference is the immunization from the sanctions of other statutes which may be given by our approval, it must be recognized that Board approval here grants antitrust law immunity. It must be recognized, too, that while we have no power to grant Railway Labor Act immunity, the possibility that this Board may have exclusive primary jurisdiction over future allegations of Railway Labor Act violations because of this agreement may produce the same result.[36] Plainly, regardless of the burden of proof, the fact of the matter is that we cannot

[34] Majority opinion, p. 176-177.
[35] *Local Cartage Agreement Case*, 15 C.A.B. 850, 853 (1952).
[36] See *Brotherhood of Railway, etc. v. Railroad Retire. Bd., supra.*

approve any agreement, unless we are completely satisfied with its legality.

The majority's imposition of various conditions to its approval in no way substitutes for that satisfaction. On the contrary, the very necessity for imposition of conditions speaks eloquently for the majority's dissatisfaction with the agreement as written and with the majority's lack of knowledge of the carriers' past and future operation thereunder. Astonishingly, in one of its conditions, the majority has stated that its approval shall not affect the rights of management or labor under the Railway Labor Act. The majority is required to decide, however, whether the agreement has operated or will operate in violation of the Railway Labor Act. If the agreement has had or will have that effect, it clearly affects the rights of employees adversely under that statute. The majority, then, has approved the agreement as not in violation of the Railway Labor Act, while, at the same time, denying that past or future violations of the Railway Labor Act have received or will receive the majority's blessing. If this approach is correct, then any section 412 agreement may be mechanically approved by substituting for factual analysis an admonition not to break the law. I cannot believe that Congress intended that we employ any such mechanical process or that our concept of administrative machinery take such a literal turn.

An unwillingness to hear evidence before rendering a decision is more consistent with *laissez-faire* concepts than with regulatory responsibility. As a regulatory body, it is our duty to be fully informed before deciding matters so clothed with the public interest.

We cannot approve agreements such as the one before this Board by pleading the absence of facts when the facts are available. Here, in spite of a prima facie indication that the agreement is repugnant to the purposes of the Railway Labor Act, the majority has granted its approval, not on an insufficient record, but in the total absence of any evidentiary record. In addition, this deficiency is aggravated by the fact that bureau counsel, normally the sole spokesman for the public interest, has neither participated in oral argument nor filed a statement of position.

From all of the foregoing, I conclude that this mutual aid agreement must be disapproved as adverse to the public interest. The agreement strikes at the heart of the policy of the Railway Labor Act, a statute which embodies the wisdom acquired through years of trial and error in labor legislation. The public interest inherent in uninterrupted air transportation is not served by permitting management to pit itself openly and adamantly against good-faith bargaining with its employees. Air transportation will continue to progress only in an atmosphere of mutual management-labor respect and cooperation. It will not do so by permitting air carriers, in a private agreement, to rewrite the Railway Labor Act by silencing the employee's voice in the determination of his wages and conditions of employment.

APPENDIX A

AGREEMENT dated as of October 20, 1958 between American Airlines, Inc., Capital Airlines, Inc., Eastern Air Lines, Inc., Pan American World Airways, Inc., Trans World Airlines, Inc., and United Air Lines, Inc.

WITNESSETH:

WHEREAS, the parties are common carriers holding certificates of public convenience and necessity issued by the Civil Aeronautics Board (hereinafter called CAB) providing for the transportation by air of persons, property and mail; and

WHEREAS, the mutual interests of the parties call for the taking of all proper and lawful measures to bring about sound and reasonable economic conditions that will be of benefit to the air transport industry and to the public; and

WHEREAS, the parties and other airlines are facing or faced with the threat of extreme and unreasonable demands made by representatives of certain of the classes and crafts of their employees, as exemplified by the current dispute between certain of the parties and their maintenance and related employees, represented for the purpose of collective bargaining by the International Association of Machinists, AFL/CIO (hereinafter called IAM), a controversy in which IAM has rejected and shown an utter disregard for the recommendations of the Emergency Board 122 appointed by the President of the United States to investigate said dispute and has struck Capital Airlines and threatened to strike other carriers for their insistence upon substantial compliance with the terms of said recommendations, which action of the IAM tends to undermine the influence, position and integrity of such Board and is destructive of the collective bargaining process; and

WHEREAS, it is in the public interest and the interest of the parties hereto that the recommendations of such Presidential Emergency Board created under the provisions of the Railway Labor Act be respected by the employers and employees whose dispute was heard by the Board;

Now, THEREFORE, the parties hereby agree:

1. In the event any party suffers a strike, resulting in the shutdown of its flight operations, which has been called for reasons which include the enforcement of demands in excess of or opposed to the recommendations of a board established by the President of the United States under section 10 of the Railway Labor Act and applicable to such party; or which has been called before the employees on strike shall have exhausted the procedures of the Railway Labor Act or which is otherwise unlawful; then, in such event, each party will pay over to the party suffering the strike an amount equal to its increased revenues attributable to the strike during the term thereof, less applicable added direct expenses. Payments shall be made monthly within 10 days after the close of each calendar month or at such more frequent intervals as may be agreed to by the parties.

2. The party suffering such a strike will make every reasonable effort, with its employees still on duty, to provide the public with information concerning all air services rendered by the other parties, and to direct to them as much of the traffic normally carried by the party suffering such a strike as possible, all as the best interests of the members of the public may require.

3. Any other air carrier holding a certificate of public convenience and necessity issued by the CAB may become a party to this agreement by signing counterpart copies thereof, forwarding copies to each of the other parties and to the CAB for filing.

4. This agreement shall become effective immediately and shall be filed with the CAB. If this agreement shall be disapproved by the CAB, it shall terminate forthwith to the extent disapproved, and payments made hereunder, to the extent that they are affected by the terms of such disapproval, shall become and be treated as an obligation to and owing from the party suffering the strike to the paying party. This agreement shall continue in effect for a period of one year from the date hereof.

IN WITNESS WHEREOF, the parties have signed this agreement as of the date first above written.

AMERICAN AIRLINES, INC.
By /s/ C. R. SMITH
President
CAPITAL AIRLINES, INC.
By /s/ David H. Baker
President
EASTERN AIR LINES, INC.
By /s/ Eddie Rickenbacker
Chairman of the Board
PAN AMERICAN WORLD AIRWAYS, INC.
By /s/ Juan T. Trippe
President
TRANS WORLD AIRLINES, INC.
By /s/ Charles S. Thomas
President
UNITED AIR LINES, INC.
By /s/ C. F. McErlean
Vice-President—Assistant to President

STATE OF VIRGINIA }
COUNTY OF ARLINGTON } ss.:

HAYES DEVER, being duly sworn, deposes and says that he is Secretary of Capital Airlines, Inc.; that he has read and is familiar with the contents of the attached agreement dated as of October 20, 1958, between American Airlines, Inc., Capital Airlines, Inc., Eastern Air Lines, Inc., Pan American World Airways, Inc., Trans World Airlines, Inc., and United Air Lines, Inc.; and that the attached agreement is a true and complete copy of the original agreement executed by the parties.

/s/ Hayes Dever

(NOTARIZED)

APPENDIX B

DEPARTMENT OF COMMERCE
Washington, D.C., January 14, 1959.

Hon. JAMES R. DURFEE,
Chairman, Civil Aeronautics Board, Washington, D.C.

DEAR MR. CHAIRMAN: You asked our views in connection with the Board's consideration of the agreement by six certificated air carriers for mutual assistance in the event of strike. Each of these carriers has undertaken, in the event of a strike occurring under certain conditions, to pay to any participating carrier forced to suspend flight operations, any net gain realized as a result of such shutdown from operations over routes over which it is competitive with the struck carrier. These payments are to be made only if the strike was called to enforce demands in conflict with recommendations made by a Presidential board appointed under Section 10 of the Railway Labor Act, or if the strike was called before the procedures of the Railway Labor Act had been exhausted, or if the strike is unlawful.

Since the agreement affects matters within the purview of Section 412(a) of the Civil Aeronautics Act of 1938 (now the Federal Aviation Act of 1958), the Board has accepted it for filing and has commenced proceedings under Section 412(b) of the Act to determine if it should be approved or disapproved. In this respect the Board must determine whether the agreement is adverse to the public interest.

We believe this agreement is consistent with the public interest and that it should be approved by the Civil Aeronautics Board.

During the past two decades, air transportation has evolved from a mode of transport utilized by the venturesome few into an economic necessity. More and more, our Nation's commerce has come to depend upon and require the uninterrupted and economic services of our air carriers. This dependence

upon air transportation and the need, in the public interest, for adequate, safe and continuous service has been recognized by Congress in the statutory scheme which has been adopted for the regulation of this industry. Air carriers may not operate routes unless authorized to do so by the Civil Aeronautics Board. Once such authority has been granted, safe and adequate service must be provided without interruption unless the carrier is authorized by the Board to suspend such operations. Air carriers must comply with the requirements of the Railway Labor Act in the conduct of their labor relations, or face the possibility of loss of their authority to operate. In addition to this, the added costs which may be assumed by air carriers as a result of bargaining with their employees cannot be automatically passed on to the public in the form of higher rates. Under the law, the Civil Aeronautics Board has the final word on the rates which air carriers may charge. In short, certificated air carriers have very little choice—they must provide service, they must operate at fares consistent with determinations of the Board and they must abide by the requirements of the Railway Labor Act.

In contrast with this, the freedom of organizations representing air carrier employees to take action to enforce their demands is virtually unlimited. The initiative in determining whether or not to use economic compulsion to enforce demands and the extent and duration of such compulsion rests with the employees and their organizations and not with the air carriers. Neither Civil Aeronautics Board nor the National Mediation Board nor any other agency of the Government has authority to circumscribe the freedom of action which air carrier employees have in dealing with their employers. It is in this posture therefore that air carriers and their employees sit down to bargain. The carriers cannot curtail or suspend their operations as a means of enforcing their demands. The carriers cannot refuse to follow the procedures provided by the Railway Labor Act. The carriers cannot act in any manner not in accord with requirements provided by law. Any action along these lines could result in proceedings by the Civil Aeronautics Board to deprive the carrier of its right to operate in air transportation.

Carrier employees can suspend operations by striking. They can refuse to follow the procedures provided by the Railway Labor Act. Their right to strike is specifically guaranteed by law and there is no legal penalty to consider for their failure to follow procedures promulgated to assure peace and stability in labor-management relations.

The ultimate procedure provided by the Railway Labor Act is the appointment by the President of, and consideration of the dispute by, a Board empowered to make recommendations. It is true that neither party is bound to accept these recommendations. It does not follow from this, however, that it is to be expected that either party should freely disregard these recommendations and seek to compel the other party to do likewise. The weapon which the employees have to compel such disregard is the strike. When this weapon is used against one of a number of competing air carriers, a logical extension is the fact that the operating carriers reap economic benefit from the struck carrier's enforced suspension of flight operations.

In the agreement which is before the Board, the parties undertake not to retain such benefit but rather to restore the net gain realized to the carrier whose employees have struck. Is this adverse to the public interest? Considered in the light of the conditions which must be met before payments under the agreement are to be made, we believe the answer to this question must be no.

The purposes sought to be served by the agreement—to discourage rejection of recommendations made by disinterested Boards appointed by the President and encourage compliance with procedures provided by Congress to effect peace and stability in air carrier labor-management dealings—these objectives cannot be held to be adverse to the public interest. Neither can reasonable steps taken to further such objectives be anything but consistent with the public interest.

Certainly this agreement does not deny to the employee organizations their right to strike. It does seek to deny to them the involuntary aid of competing air carriers in the furtherance of strike objectives which are contrary to the spirit and letter of statutes designed to protect the public interest in uninterrupted air transportation service.

The effect of the agreement is to strengthen the ability of the parties to insist upon compliance by the Union with lawful procedures and the acceptance of

recommendations of disinterested public boards convened pursuant to procedures provided by Congress. As matters now stand, a Union which refuses to accept the recommendations of such a Board may strike to require acceptance of its demands. The carrier has the choice of acceding to the union demands or having to shut down and see its business and its customers forced to use the services of a competitor. The competitor has no choice but to continue to operate with the usually predictable certainty that it will be next. Its continued operations, therefore, become part of a persuasive force to require acceptance of union demands in excess of impartial recommendations. The eventual cost of this must necessarily fall upon the public. If a carrier should choose nevertheless to hold out, we have a long drawn out shutdown with the public again having to bear the eventual burden both in terms of inconvenience and financial cost. This is a regulated industry. The certificated carriers must operate and they cannot continue to operate if they lose money. Losses must be made up either in higher fares or government subsidy. The thrust of the agreement before the Board is not to enforce unreasonable demands which management might seek. It is to give a high degree of acceptability to recommendations and procedures provided by law on the part of both management and labor. We think these objectives will serve the public interest in assuring genuine collective bargaining and avoiding resorts to force as a means of settling disputes.

None of the carriers party to this agreement are receiving subsidy aid from the Government. Nevertheless, the question has been raised that the agreement poses the possibility that the Government may have to underwrite costs arising as a result of this undertaking. This, it is argued, would be adverse to the public interest. We think this issue to be irrelevant to the question of the validity of this agreement. We cannot predict what will actually happen but the following are some of the possibilities. First, none of the parties may, during the effective period of this agreement, require subsidy. Second, the effect of the agreement could be to help a carrier, which might otherwise require subsidy avoid that need. Finally, even if a carrier should have to apply for subsidy mail pay during the period of this agreement, that need more than likely would rest upon factors other than the need to meet payments made pursuant to this agreement. In any event the proper time to determine the extent to which these costs may be considered for subsidy mail pay purposes would be in a mail rate proceeding—if such a proceeding should be required in the case of a party to this agreement.

In the present proceeding it is neither contemplated nor likely that the payments made by any of the carriers will have to be underwritten by the Government. What is more important from the standpoint of public interest is that if air carrier employees are free to pursue demands in excess of the recommendations of disinterested Presidential Boards and air carriers have no choice but to accede to such demands, then the increased costs which would result may eventually have to be borne either by the users of air transportation in the form of higher fares or by the public at large in bearing the cost of increased subsidy aid. Here again the weight of public interest is on the side of permitting action taken for the purpose of encouraging acceptance of recommendations and compliance with procedures provided by law. This is the purpose sought by the air carrier's agreement.

We believe the agreement is consistent with the public interest, it will not interfere with effective and lawful collective bargaining and it will help to assure adequate, economic and uninterrupted air service necessary to the commerce of the United States.

Sincerely yours,

(S) F. H. Mueller,
FREDERICK H. MUELLER,
Under Secretary.

DEPARTMENT OF JUSTICE
Washington, December 30, 1958.

Hon. JAMES R. DURFEE,
Chairman, Civil Aeronautics Board, Washington 25, D.C.

MY DEAR MR. CHAIRMAN: Your letter to the Attorney General, dated December 8, 1958, refers to "an agreement for mutual assistance in the event of a strike" which "six certified air carriers have filed with the Civil Aeronautics Board for approval under Section 412 of the Civil Aeronautics Act." That

letter invites "both oral and written statements for the Board's consideration" in order to "aid the Board in determining whether the agreement should be approved or disapproved."

Considering this agreement, Section 2 of the Civil Aeronautics Act obliges the Board to weigh, among other factors:

> Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense (49 USC 402 (d)).

If the Board approves this agreement pursuant to §412, however, the parties are relieved, insofar as may be necessary to enable them to carry out its terms, from the operation of the antitrust laws (§414). Since the Board must weigh competitive factors before approval is granted, and antitrust immunity results, we here simply pose briefly possible competitive issues which the Board may wish to consider in making its decision.

Helpful at the outset is some sketch of the agreement's terms. Though only six certified carriers are at present signatories, Section 3 provides that "any other air carrier holding a certificate of public convenience and necessity issued by the CAB may become a party to this agreement. . . ." No matter the number of signatories, however, Section 1 limits the agreement's coverage to "a strike, resulting in the shutdown of . . . flight operations, which has been called for reasons which include the enforcement of demands in excess of or opposed to the recommendations of a board established by the President of the United States . . . ; or which has been called before the employees on strike shall have exhausted the procedures of the Railway Labor Act or which is otherwise unlawful: . . . ." Only in such cases, Section 1 goes on, is "each party" obliged to "pay over to the party suffering the strike an amount equal to its increased revenues attributable to the strike, during the term thereof, less applicable added direct expenses." Finally, in such instances, Section 2 obliges each signatory struck airline "to provide the public with information concerning all air services rendered by the other parties, and to direct to them as much of the traffic normally carried by the party suffering such a strike as possible."

Initially relevant is the question "whether the action springs from business requirements or purpose to monopolize." *U.S. v. Times-Picayune*, 345 U.S. 594, 615. To resolve this question, the Board may wish to consider whether this agreement is primarily, as would appear, essentially an outgrowth of labor-management problems in the air carrier field. Assuming the Board finds that the agreement's primary purpose is, not to affect competition among airlines, but instead to improve the signatory airlines' bargaining position vis-a-vis unions, still relevant would be the agreement's effect on competition.

Turning to the agreement's possible competitive consequences, two board issues seem relevant. First, how if at all does the agreement affect competition between airlines and other carriers? And, second, what is the agreement's likely impact on competition within the airline industry?

As for competition between scheduled air carriers and other carriers, the agreement does require struck signatory airlines "to direct" to non-struck signatory airlines "as much of the traffic normally carried by the party suffering such strike as possible . . ." The extent to which this provision's result might be to direct to other signatory airlines traffic which might otherwise go to buses, railroads or supplemental non-scheduled air carriers depends on a variety of factors. The impact on other methods of transportation might well vary with the duration of the airline strike. Beyond that, we have no way of knowing the extent to which, even absent this agreement, individual airlines as a matter of practice refer excess passengers exclusively to other scheduled airlines. Nor, assuming this provision does alter existing practice, do we know whether its impact would vary substantially from, for example, a permissible industry advertising program. In any event, those competitive considerations which Section 2 obliges the Board to consider do not clearly embrace consequences affecting modes of transportation other than airlines. With these factors in mind, in this area we cannot state that the agreement promises significant competitive consequences.

Similarly ambiguous is the agreement's likely impact on competition within the airline industry. On the one hand, during a lengthy strike the agreement might well help an airline survive as an effective competitor. The agreement might, on the other hand, make it advisable for other airlines to join so that

they may more likely, under Section 2, obtain their "share" of the strike-engendered business. And, once airlines have joined, the requirement that certain profits be turned over to the struck airline might affect signatory non-struck airlines' incentive to compete with each other for strike-spurred traffic. However, as a practical matter, the tendency to join might well be offset by the fact that, even absent reference of business by the struck line, competing non-signatories would likely pick up strike traffic; and regarding such traffic, non-signers would not be obliged to turn over any portion of profit to the struck carrier. Finally, even if the agreement encourages other lines to join, commercial advantages of building good will, and acquainting customers with a particular line's service, militate against that dampening of competition between signatory but non-striking airlines the profit turn-over provision might provide.

I trust these views will prove of some help to the Board in this matter.

Sincerely yours,

(S) Victor R. Hansen,
VICTOR R. HANSEN,
Assistant Attorney General,
Antitrust Division.

U.S. DEPARTMENT OF LABOR
Office of the Secretary
Washington, December 20, 1958.

The HON. JAMES R. DURFEE,
Chairman, Civil Aeronautics Board, Washington 25, D.C.

DEAR MR. CHAIRMAN: This is to acknowledge your letter of December 8th inviting the submission of views to the Civil Aeronautics Board in connection with its consideration of the agreement between certain airlines for mutual assistance in the event of a strike.

Your invitation is now being considered to determine if the Department will be in a position to present a written statement which will be helpful to your consideration of this matter. It is unlikely that the Department will wish to present an oral statement.

Your thoughtful invitation is appreciated.

Sincerely yours,

(S) James P. Mitchell,
Secretary of Labor.

NATIONAL LABOR RELATIONS BOARD
Washington 25, D.C., December 16, 1958.

Hon. JAMES R. DURFEE,
Chairman, Civil Aeronautics Board, Washington 25, D.C.

DEAR MR. DURFEE: This will acknowledge your letter of December 8, 1958, in which you invite oral and written statements from our Board in connection with the filing of certain air carriers for approval by your Board of an agreement for mutual assistance in the event of a strike.

I fully appreciate the desire on the part of your Board for a full expression of views and opinions by Government agencies and other segments of the interested public with respect to the matters currently pending and under consideration by you and described in your letter. I am certain that you will readily recognize, however, that because our Board is quasi-judicial in character, it has generally, as a matter of policy, refrained from reciting its views except in the context of a case actually before us for determination. This has been our policy in the area embraced by the Labor Management Relations Act which is under our administration. It would follow that our reluctance to depart from this policy would be even greater in an area, such as that under consideration by your Board which, as you know, is embraced by the Railway Labor Act and administered by a sister agency.

Under the circumstances, while we are deeply conscious of the merit of the reasons that actuated your invitation, we feel constrained to adhere to our existing policy and refrain from an expression of views and opinions as contemplated by your request.

Sincerely yours,

(S) Boyd Leedom,
BOYD LEEDOM,
Chairman.

NATIONAL MEDIATION BOARD
Washington, December 31, 1958.

Hon. JAMES R. DURFEE,
Chairman, Civil Aeronautics Board, Washington 25, D.C.

DEAR MR. DURFEE: Further reference is made to your letter of December 8, 1958 transmitting copy of Civil Aeronautics Board Order No. E-13233, also copy of agreement made by the various airlines for mutual assistance in the event of a strike.

The Members of the National Mediation Board have given careful consideration to your invitation to present oral and written statements on this subject to your Board. In view of its primary function as a mediatory agency handling labor disputes between rail and air carriers and the various organizations representing their employes, the National Mediation Board is not in a position to express an opinion on a controversial question of this nature.

Very truly yours,

(S) Leverett Edwards,
LEVERETT EDWARDS,
Chairman.

ORDER

There having been filed with the Board, pursuant to section 412(a) of the Act, agreement CAB 12633, entered into by six carriers and providing for certain mutual assistance upon specified conditions; and

The Board having, after due consideration of said agreement and after oral argument with respect thereto, issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED—

1. That, except as indicated below, agreement CAB 12633 is not adverse to the public interest, and should be approved;

2. That the approval referred to above should in the public interest be made subject to the following conditions:

(a) The agreement should be amended by deleting clause 2 thereof, relating to routing of traffic by a struck carrier party;

(b) The approval referred to above shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

(c) The approval granted herein shall not be deemed a determination of the reasonableness of the financial provisions of the agreement for future ratemaking or other regulatory purposes under the Act;

3. That each carrier-party to the agreement shall file with the Board as amendments to the agreement any subsidiary agreements or arrangements which set forth the actual or contemplated methods for (a) determining when employee demands are in excess of, or opposed to, the recommendations of a board established under section 10 of the Railway Labor Act, when a strike has been called before exhaustion of the procedures of the Railway Labor Act, or when a strike is otherwise unlawful, all as stated in clause 1 of the agreement, and by whom such determinations may be made; or (b) measurement of the increased revenues attributable to a strike and applicable added direct expenses as stated in clause 1 of the agreement; and that, if there are no such agreements or arrangements, each of the carrier-parties shall individually so state. Said parties shall also file a statement of any monies which have been paid pur-

20 C.A.B.—168

suant to the agreement indicating the amount paid by each carrier-party and to whom such payment has been made;

4. That any carrier-party which states that no such agreements exist shall file with the Board a complete and detailed statement of (1) any agreements which it may have made with any of the other carrier-parties, individually or collectively, regarding any of the matters specified in ordering paragraph 3, or a statement that there are no such agreements; (2) its understanding of all its obligations under the agreement; (3) its past, present or contemplated future practices regarding the agreement;

5. That each carrier-party to the agreement shall file with the Board a complete, detailed statement of the bases for each payment made.

6. That each carrier-party which has been, or is in the future, struck shall file with the Board for the duration of each strike a statement containing the following information with respect to revenues and expenses:

(a) An estimate of the dollar amount of operating revenues lost due to cessation of operations;

(b) The dollar amount of payments received under the agreement and, separately, any related tax accruals;

(c) An estimate of the dollar amount of normal operating expenses which would have been incurred to earn the revenues which it is estimated would have been received;

(d) The dollar amount of revenues and expenses of the period as follows: (i) total operating revenues; (ii) total operating expenses; (iii) nonoperating income and expense—net; (iv) special items; (v) Federal income taxes and tax credits; (vi) net income after special items;[1]

7. That each carrier shall continue to file monthly reports of all the information required to be filed by ordering paragraphs 3 through 6 of this order, until further order of the Board; that negative reports shall be filed by each carrier as to each item for which, during the reporting period, there has been no change from the preceding reporting period; and that such continuing reports shall be filed not later than the 15th day of the month next following the month for which data are reported;

8. That the approval granted herein shall be conditioned upon the filing, within 30 days of service of this order, of an amendment to the agreement in conformance with this order.

9. That the petitions of Air Line Pilots Association, International, and Air Line Agents Association, International, dated February 2 and 12, 1959, be and hereby are dismissed.

[1] The data furnished pursuant to subparagraph (d) above shall be in accordance with the accounting and reporting provisions of part 241 of the Economic Regulations and exclusive of any payments received under the terms of this agreement.

APPENDIX C

Six-Carrier Mutual Aid Pact

Supplemental Opinion and Order on Reconsideration Order E-14563 (1959)

Opinion of the Board
Opinion of Member Minetti, dissenting

DOCKET 9977
(E-14563)

SIX-CARRIER MUTUAL AID PACT

Adopted October 19, 1959

SUPPLEMENTAL OPINION AND ORDER ON RECONSIDERATION

BY THE BOARD:

The Board in its decision of May 20, 1959 (order E-13899), 29 C.A.B. 168, conditionally approved under section 412 the financial provisions of the above-styled agreement providing limited mutual assistance in the event of certain strikes. A joint petition for reconsideration of our opinion and order and other relief, and motion for leave to file late, have been filed by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, and the International Association of Machinists. Answers in opposition to the petition and motion have been filed by the six air carrier parties to the agreement.

We have considered the contentions of the parties and conclude that the matters set forth in the petition do not establish error in the Board's decision or otherwise establish that the relief requested is warranted.

1. We have chosen to consider the petition on its merits despite petitioner's failure to show good cause for failure to make timely filing. The petition was submitted for filing 10 days after the expiration of the period for such action under rule 37(a), as amended, but within the period provided by that rule prior to February 14, 1959, the effective date of the amending regulation.[1] The unchallenged allegations of the motion for leave to file are that counsel for petitioners first learned of the change in the Board's procedural regulations on the date he submitted the petition; that petitioners and counsel were neither given nor had actual notice of or experience with the revision of rule 37; that officers of both petitioners were engaged as witnesses in congressional hearings so that the necessary authorization to file the petition was not received until after the due date; that such authorization was further delayed by reason of the Ohio location of the headquarters of one petitioner; and that consideration of the petition on its merits will not prejudice any party to the pact.

As pointed out by the answering parties, these statements are not the "showing of unusual and exceptional circumstances, constituting

[1] Regulation PR-34, adopted Feb. 11, 1959, effective Feb. 14, 1959, shortened the time for filing petitions for reconsideration from 30 to 20 days.

good cause for movant's inability to meet the established procedural dates" contemplated by rule 37(a) as a basis for the grant of a motion for leave to file a petition after the time for the filing thereof has expired. The publication of revised rule 37 in the Federal Register[2] was sufficient to give notice to any person subject thereto or affected thereby regardless of actual knowledge,[3] and the failure to obtain authorization while corporate officers were otherwise engaged is not equivalent to an inability to do so.

The failure to lodge the petition within the four corners of our Procedural Regulations would normally disqualify it from further consideration by the Board. In this instance, however, we shall exercise our discretion to relax our rules, based upon consideration of the surrounding circumstances, the lack of prejudice to any party, and the public interest in a decision upon the merits. The allegations of the motion demonstrate the inadvertent nature of the failure to comply with established procedural dates. The brief delay resulting from the late filing will neither prejudice nor unduly impose upon the air carrier parties, who remain legally free to operate under the agreement as approved. Most importantly, a final disposition on technical procedural grounds of a matter so heavily weighted with the public interest would be a disservice to all concerned, for certain allegations contained in the petition strike at the core of the basic fairness of our decisional process. These considerations lead us to entertain the petition.

2. On the merits, petitioners contend that it was the Board's duty, upon its own initiative, to order an evidentiary investigation of the agreement. It is alleged that, by proceeding upon the basis of written briefs and oral argument, the Board unfairly foreclosed presentation of pertinent matters.

We disagree. Of course, we fully recognized that the substantial impact of the agreement upon air carriers, their employees, and the public made some form of hearing appropriate despite the fact that there is no statutory requirement for a hearing in respect to agreements filed under section 412 of the Act. But we were also cognizant that no person had requested a hearing, that the grounds of objection to the agreement were alleged to be "clear," "obvious," or "patent on its face," and that various considerations, including petitioners' request for disapproval "as promptly as possible," made speedy action by the Board desirable. Balancing these considerations, and having determined that the agreement was not prima facie repugnant to law, we correctly concluded that the matter of approval or disapproval of the agreement should be set down for oral argument at an early date, with ample opportunity for submission of pertinent matter in writing.[4]

It is noteworthy that petitioners did not seek reconsideration of the procedure of which they now complain either at the time we made our intentions plain or at any other time prior to the issuance of our decision. Indeed, even at this late date, after many months of experience with the operation of the agreement, petitioners have wholly failed to spell out any specific factual matters which they expect to prove after evidentiary exploration and which might in-

[2] 24 Fed. Reg. 1152, Feb. 14, 1959.
[3] 44 U.S.C.A. sec. 307; *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).
[4] Order E 13233, Dec. 4, 1958, 28 C.A.B. 964.

fluence the Board to reconsider its decision. These matters do not lend merit to petitioners' suggestion that the Board abused a discretion which was invoked by no party. We are confident that our procedures provided petitioner with a wholly fair opportunity to support its objections, and that the Board took full and correct account of all the considerations pertinent to the public interest implications of the agreement.

3. Petitioners allege that the Board incorrectly construed section 412 as requiring only the negative finding that the agreement is not adverse to the public interest and, therefore, improperly confined its review of the agreement to a determination whether there were in the record affirmative facts clearly showing it to be inconsistent with that interest. It is contended that the Board erred in failing to determine whether the agreement in fact effectuates the public interest and the purposes of the Act.

We cannot agree, for our decision was not predicated upon the niceties of negative as opposed to affirmative findings. By our procedure we allowed development of a full record concerning the meaning and effect of the agreemnt and, against this background and without indulging in any presumptions, arrived at the conclusion that the agreement accorded with the statutory criteria for approval. Our conclusion rested upon an assessment of the agreement, as amplified by the record, in light of the public interest and the objectives of the Act, and not, as petitioners assume, upon the failure of any party to come forward with evidence. Although we were mindful of the meagerness of the showing made by those objecting to the agreement, we did not reach our conclusion until satisfied by the record that the agreement would be unprejudicial to the public interest. Our decision to approve the agreement was based upon a conviction that, in light of all circumstances, the objections fully unfolded upon an adequate record were lacking in merit. Accordingly, we must reject petitioners' argument insofar as it attributes our approval to subtle statutory phraseology or burden of proof.[5]

4. The petition contains excerpts from the legislative history of the Railway Labor Act in an attempt to show that the intent of Congress was hostile to agreements such as the one before us. The congressional history, however, only confirms our original view that, in the Railway Labor Act, Congress restricted the ambit of its proscription against compulsion to governmental action, and left the parties free to engage in reciprocal tests of economic strength within the framework of collective bargaining.

The remaining points advanced by the petition reiterate matters previously raised and fully considered in the Board's original opinion. We find nothing presented which establishes error in our determinations and, consequently, adhere to our decision in this matter. Accordingly,

IT IS ORDERED—

1. That the motion for leave to file petition for reconsideration filed herein by the Brotherhood of Railway and Steamship Clerks,

[5] Nothing in *Acquisition of Mayflower Air, by Northeast Air.*, 4 C.A.B. 680 (1944), quoted by petitioners, is inconsistent with the views expressed herein. Indeed, that case involved transfer of a certificate under sec. 401, as well as purchase of properties under sec. 408, and sec. 401 is framed in terms of an affirmative finding of consistency with the public interest.

Freight Handlers, Express and Station Employes, and the International Association of Machinists, be and it hereby is granted;

2. That the petition for reconsideration and other relief so filed be and it hereby is denied.

Durfee, Chairman, Gurney, Vice Chairman, and Denny, Member of the Board, concurred in the above opinion and order. Minetti, Member, filed the following dissent.

MINETTI, *Member*, dissenting:

I would grant the petition filed by the Brotherhood of Railway & Steamship Clerks and the International Association of Machinists (Machinists) for reconsideration of the Board opinion and order by which this six-carrier mutual aid agreement was approved. As the petition correctly points out, minimal justice requires that governmental sanction be given only after all pertinent factual information has been developed through the evidentiary hearing process. Alternatively, and absent a satisfactory explanation of the preliminary indications of the agreement's illegality, the petition properly seeks summary disapproval.

The majority's treatment of the Machinists' petition is disappointing. After devoting several pages in debate over whether the petition should be entertained, the majority disposes of the petition with three arguments:

First, the majority states, since no party requested an evidentiary hearing, no probing of the facts underlying the mutual aid agreement is required. Clearly, however, the absence of any such request cannot excuse a failure to exercise this Board's statutory obligation to explore the facts underlying this agreement. As I indicated in my earlier dissenting opinion, those facts of which we are currently aware should themselves prod the Board into seeking evidentiary explorations of the prima facie violations of the Railway Labor Act which are apparent therein. But whatever the Board's duty may be where no evidentiary hearing has been requested, the Air Line Agents Association did request such a hearing subsequent to oral argument in this proceeding. In these circumstances, the majority's surprise at the Machinists' current request is unimpressive.

Second, the majority states, without perceptible embarrassment, that its approval "was not predicated upon the niceties of negative as opposed to affirmative findings," but on the "full record."

In view of its earlier allusions to the necessity for an affirmative showing of illegality [1] as a prerequisite to disapproval, the majority's

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[1] Compare the following excerpts from *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168 (1959):

"• • • the Board has determined to approve the agreement since • • • *the basic agreement cannot be found to be adverse to the public interest or in violation of the Act.*" (p. 170) [Emphasis added.]

"• • • we are governed by section 412 of the Act, which provides that *we shall approve any agreement not found* to be adverse to the public interest[3] or in violation of the Act." (p. 170) [Footnote omitted; emphasis added.]

"• • • the record is devoid of any showing that the duration of any dispute was prolonged as a result of the mutual aid [agreement] • • •" (p. 171).

"• • • we must conclude that the unions have failed to prove their contentions that the agreement violates the Railway Labor Act." (p. 173)

"• • • After examining the record, *we cannot conclude* that the industry • • • will be afflicted by such a disparity in economic power as to jeopardize the attainment of the statutory objectives." (p. 173-174) [Emphasis added.]

"• • • *the Board's order follows from the lack of any affirmative showing* that the agreement is adverse to the objectives specified by the Congress." (p. 177) [Emphasis added.]

present position is surprising. It appears, moreover, to be destructive of any basis for Board action, for, if stripped of presumption, all that remains of the majority order is "see-no-evil" neutrality.

This desire for Governmental neutrality in management-labor affairs constitutes the majority's third argument in answer to the petition for reconsideration. The Railway Labor Act, it urges, forbids Governmental compulsion or interference in management-labor relations; the Railway Labor Act does not prohibit economic compulsion by either party, the majority states, but "leaves the parties free to engage in reciprocal tests of economic strength within the framework of collective bargaining." The majority fails to recognize, however, that sincere collective bargaining is the substitute for, rather than the companion of, economic compulsion. The majority further fails to recognize that despite its earnest desire to remain neutral, its summary grant of antitrust, and possibly Railway Labor Act, immunity, has thrown the considerable weight of the U.S. Government on the side of management in this dispute. Moreover, its willingness to permit the Bureau of Air Operations to abstain from participation in this proceeding has, to a large extent, shielded the agreement from examination for consistency with the public interest and has added further partisan color to the Governmental action.

Since the filing of the petition for reconsideration, union plans to counteract the mutual aid agreement with interunion assistance have been publicly reported.[2] While this reported union reaction to the six-carrier combination, if accurate, is neither unexpected nor unreasonable, it emphasizes the variance between the purposes of the Railway Labor Act and the aims and natural consequences of the six-carrier mutual aid agreement. I can only hope that the carrier parties to the agreement will bring about a cease fire in employer-employee hostilities by refusing to extend the mutual aid pact beyond its October 20, 1959, termination date.

Neither the impact nor the significance of this agreement is confined to the immediate carrier parties, on the one hand, and the Machinists, on the other. On the contrary, the agreement threatens to affect the future welfare of the entire industry at a time when productivity and mutual labor-management respect and cooperation are essential. To the extent that this agreement has increased the possibility of future industrywide work stoppages, both the carriers

[2] Aviation Week, Sept. 28, 1959, page 47:

"Threat of intensified airline labor disputes and possibility of industry-wide bargaining mounted last week as six air transport unions planned a mutual aid pact as a counter to the mutual aid pact signed last year by six major airlines."

• • • • • • •

"Although union attorneys had indicated such action might result from CAB approval of the airline pact, announcement of the labor union agreement at the American Federation of Labor-Congress of Industrial Organizations convention in San Francisco came as a surprise to most of the airline industry."

• • • • • • • • •

"Union committee plans to fight the airline mutual aid pact, under which four of six carriers collected benefits while struck last year and call for a change of contract dates by the six unions involved so that contract renewals fall on a common date. All carriers refusing to grant the unions' collective bargaining demands could thus be forced into a strike simultaneously, according to union spokesmen.

"Clear indications that the unions plan such a course were evident last year when representatives of the engineers, mechanics and pilots' unions fought the airline mutual aid pact before the CAB. • • •

"However, airlines feel that unions might think twice before carrying out their across-the-board strikes, since any large scale crippling of the airline industry could be termed a national emergency, permitting the government to assume control of the carriers until labor disputes were settled."

and the majority have done a great disservice to the remaining trunklines, who, by abstaining from participating in this agreement, have stamped the mutual aid approach as less than a satisfactory means of solving management-labor differences. The majority's uninformed "neutrality," moreover, is under these circumstances in dereliction of the congressional mandate to promote as well as to regulate air transportation.

APPENDIX D

Order Instituting Investigation
Order E-15413 (1960)

ORDER INSTITUTING INVESTIGATION

DOCKET 9077, AGREEMENT CAB 12653-A1 THROUGH A6, MUTUAL AID PACT—order E-15413, adopted June 29, 1960.

By an agreement filed October 23, 1959, the six carrier members of the Mutual Aid Pact (Pact)[1] extended its expiration date to October 20, 1960. By agreements of various recent dates, four additional carriers became Pact members.[2] These four carriers reserved the right to withdraw from the Pact if the Board disapproves an amendment thereto, dated March 7, 1960, but filed March 22, 1960. This amendment appears to broaden the conditions under which member carriers will receive payments. The original Pact[3] provided for payment, *inter alia*, for strikes called to enforce employee demands in excess of or opposed to the recommendations of Presidential Emergency Boards created pursuant to section 10 of the Railway Labor Act (RLA). The amendment of March 7 also provides for payment for strikes which have "been called in the absence of the establishment of such a board and the struck party has in all respects acted in compliance with the Railway Labor Act."[4] Thus, in effect, strikes resulting from disputes in which no emergency boards have been appointed are compensable whether or not the union concerned has complied with the RLA, as long as the carrier has complied there-

[1] American Airlines, Inc. (American), Capital Airlines, Inc. (Capital), Eastern Air Lines, Inc. (Eastern), Pan American World Airways, Inc. (Pan American), Trans World Airlines, Inc. (TWA), and United Air Lines, Inc. (United).

[2] Braniff Airways, Inc. (Braniff), Continental Air Lines, Inc. (Continental), National Airlines, Inc. (National), and Northwest Airlines, Inc. (Northwest).

[3] Approved by *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168 (1959).

[4] Emergency Boards may be appointed by the President in his discretion if the National Mediation Board has notified him that, in its judgment, a strike threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service." RLA § 10.

with. Prior to this amendment, such strikes were compensable only if the employees had not exhausted RLA procedures before striking, or if "otherwise unlawful." It therefore appears that the only strikes of member carriers which will not be covered in the future are those in which the carrier violates the RLA, or in which employees strike to enforce demands which do not exceed or oppose emergency board recommendations.[5]

On April 12, 1960, objections to the amended Pact were filed by several unions individually and jointly through the Association of Air Transport Unions.[6] The unions request either immediate disapproval of the amended Pact or a full evidentiary hearing thereon. They contend that the effect of the amended payment provision is "to encompass in substance any strike involving one of the participating carriers and resulting in the shutdown of its flight operations regardless of the merits of the dispute and regardless of whether the strike is provoked by arbitrary and unreasonable actions of a carrier." They state that the amended Pact is a "deliberate sharpening by management of conflict between labor and management;" that "the public interest involved [in strikes not important enough to warrant appointment of emergency boards] is by definition insufficient to justify the application of the mutual aid pact thereto;" that the coverage amendment "constitutes an effort by the participating carriers to evade the responsibilities and duties imposed upon them by Federal law;" and that the carriers' seeming effort to extend the Pact throughout the industry "is hardly consistent with stability of labor relations that the Board found to be a part of the public interest" in originally approving the Pact. The unions request a hearing because (1) although not required by statute, the ramifications and possible impact of the Pact are such that a hearing is required by due process of law; (2) the Pact, especially in its broadened form, has many speculative and otherwise unassessed facts; and (3) the carriers intend to prolong the Pact indefinitely beyond its present expiration date through piecemeal extensions. They contend that the hearing should include all issues raised by the original agreement and its amendments.

The carriers replied to these objections on April 20, 1960. They state that the union objections purport to relate to the recent amendments but actually renew objections previously made to the original agreement and rejected by the Board. The amended payment clause is, according to the carriers, merely a means of permitting smaller carriers to participate in the Pact. It is necessary because emergency boards are not likely to be appointed for the disputes of smaller airlines. By conditioning payment upon carrier compliance with the RLA, the payment amendment bolsters the RLA; it does not otherwise alter the essential nature of the agreement as originally approved by the Board or lessen the safeguards that it provides, according to the carriers. The addition of four new members to the Pact raises no new issue, the carriers contend, because the original Pact specifically provided for the admission of new parties. Thus, the prospect that other carriers would become members was clearly within the contemplation of the Board when it approved the original agreement. With respect to a hearing, the carriers state that there are no pertinent factual issues which could be developed at a hearing, and that the objections are based on legal or policy arguments rather than issues of fact. The carriers offer to appear at oral argument to discuss any matters which the Board may wish to hear.

The Board has carefully examined the pending amendments and objections thereto and has determined to order a formal investigation.[7] The addition

[5] Other than the above, the agreement provides no method for determining when carriers will be paid. Past practice has been for the members to make this decision, submitting the matter to arbitration if unable to agree among themselves. See orders E-14693, Nov. 30, 1959, and E 14897, Feb. 3, 1960.

[6] The members joining in the filing are the Air Line Pilots Association, (ALPA), Air Line Dispatchers Association (ALDA), Brotherhood of Railway and Steamship Clerks (BRC), Flight Engineers International Association (FEIA), International Association of Machinists (IAM) and Transport Workers Union (TWU). The United Automobile Workers (UAW) subsequently concurred in the filing.

[7] By instituting this investigation, the Board does not intend to prejudge its eventual action on the 10-member Pact or its amended payment clause. Further, our action is without prejudice to the rights and obligations of the 6 carrier members of the original Pact, as amended by the renewal agreement of Oct. 23, 1959, extending the life of that Pact to Oct. 20, 1960. It is to be noted that agreements such as those here involved, which are subject to review by the Board under sec. 412, may be made effective among the parties without first being approved by Board order. This, it appears, is the case here.

of four new members and amendment of the payment provision substantially increase the possible impact of the Pact.[8] (Its 10 carrier participants carried approximately 90 percent of all trunkline traffic in 1959.) It also appears likely that, although the Pact will expire by its terms in a few months, the principle of mutual aid is intended to become a long-term feature of labor management relations in the industry. The inclusion of new members at this time lends support to this conclusion. Most important, the parties have now experienced more than a year of operations under the Pact, during which it was applied to four strikes. There should therefore be available for Board consideration valuable factual data, most of which were not ascertainable at the time of the previous proceeding.

In view of these circumstances, the Board desires to examine in detail the expanded Pact and the operating experience gained under the previous Pact. In its original order of approval, the Board noted that it did not have before it an evidentiary record against which to test various contentions of the parties regarding the legality and desirability of the agreement itself and of operations under it. The investigation ordered herein will furnish a vehicle for complete examination of the issues previously considered by the Board, together with such new matters as may be raised by developments in the interim. It will also aid in determining to what extent the carriers are developing long-term mutual labor-relations arrangements, and the possible impact of these arrangements on industry employment, stability, and related matters which it is the Board's duty to consider in weighing whether the agreements are consistent with the public interest.[9]

Accordingly, the Board finds that this investigation is appropriate in order to carry out the objectives of the Act. The 10 Pact members will be made parties to the investigation, together with the objecting unions and any other organizations designated as collective bargaining representatives of these carriers which desire to intervene. Because of the importance of the issues and its relative lack of expertise in this area, the Board is repeating its earlier invitation to other Government agencies to participate in the case.[10]

THEREFORE, IT IS ORDERED—

1. That an investigation be and it hereby is instituted, pursuant to the provisions of sections 204(a), 407, 412, and 1002(b) of the Act, to determine whether the Pact, as amended, is consistent with the public interest and not in violation of the Act;

2. That the following persons be and they hereby are made parties to the investigation: American, Braniff, Capital, Continental, Eastern, National, Northwest, Pan American, TWA, and United; ALPA, ALDA, BRC, FEIA, IAM, TWU, and UAW;

3. That each air carrier party shall serve a copy of this order upon each employee organization with which the party bargains collectively as representative of its employees, other than the organizations named as parties by paragraph 2 hereof; and that a report of such service be filed with the Board within 10 days of the date of this order; and

4. That the investigation ordered herein be assigned for hearing before an examiner of the Board at a time and place hereafter to be designated.

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[8] As noted above, the carriers urge that the addition of new members was within the Board's contemplation when it approved the original Pact. It should be clear from the discussion above that the addition of new members plays but a small part in our decision to order a hearing. However, we reject in passing the technical notion that our approval for 1 year of a narrower agreement limits the issues to be decided or the evidence to be adduced in the hearing we are ordering herein.

[9] The Board already has in its possession certain material obtained through the ATA Inspection and Review Proceeding, docket 10281, which bears upon these and other relevant questions and indicates the need for holding a full evidentiary hearing.

[10] In considering the original Pact, the Board invited the Commerce, Justice, and Labor Departments, the National Mediation Board and the National Labor Relations Board to present their views. The Board will send a copy of this order to each of these agencies.

APPENDIX E

Mutual Air Pact Investigation
Order E-21044 (1964)

Opinion of the Board

Opinion of Vice Chairman Murphy,
concurring and dissenting

Opinion of Member Minetti, dissenting

Initial Decision of Examiner S. Thomas Simon

Mutual Aid Pact of 1958

Mutual Aid Pact as Amended Through
December 31, 1961

Mutual Aid Pact Incorporating Supplemental
Payments Amendment, dated December 31, 1961

DOCKET 9977
(E-21044)

MUTUAL AID PACT INVESTIGATION

Decided July 10, 1964

The Mutual Aid Pact, as amended by agreements CAB 12633A through A8 is not found to be adverse to the public interest but is consistent therewith and is not in violation of the Act and is approved, subject to conditions.

The arbitration agreement (CAB 14622) is not found to be adverse to the public interest or in violation of the Act and is approved, subject to a condition.

APPEARANCES:

Howard C. Westwood, Charles A. Miller, Jerome Ackerman, Jerry L. Oppenheimer, Guy Farmer, and *John A. McGuinn* common counsel for carrier parties, except National Airlines, Inc.

John W. Cross, Andrew T. A. Macdonald, and *Jerome A. Barron* for National Airlines, Inc.

H. Templeton Brown for United Air Lines, Inc.

Edmund E. Harvey and *Carl S. Rowe* for Trans World Airlines, Inc.

B. Howell Hill and *Walter D. Hansen* for Braniff Airways, Inc.

E. Smythe Gambrell and *W. Glen Harlan* for Eastern Air Lines, Inc.

George A. Spater and *Arthur M. Wiechart* for American Airlines, Inc.

Emory T. Nunnelcy, Jr., and *Joseph F. Healy, Jr.,* for Northwest Airlines, Inc.

Patrick M. Westfeldt and *Joseph F. Healy, Jr.,* for Continental Air Lines, Inc.

John C. Pirie for Pan American World Airways, Inc.

James L. Highsaw, Jr., and *Edward J. Hickey, Jr.,* for union parties.

Paul Y. Seligson and *William J. Driscoll* for the Bureau of Economic Regulation.

OPINION OF THE BOARD

BY GILLILAND, *Member*:

The basic question in this proceeding is whether the Mutual Aid Agreement, as amended (Pact), providing for mutual financial assistance in the event of a shutdown of flight operations of one or more of its air carrier signatories as a result of certain strikes, should be approved. Also involved is an agreement between the parties to the Pact to arbitrate a dispute concerning its applicability to a disruption of service suffered by Eastern Air Lines in June 1960. The statute (sec. 412 of the Act) requires that we approve agreements unless found to be adverse to the public interest, or in violation of the Act.

The present proceeding stems from the original Six-Carrier Mutual Aid Pact which was filed with the Board for approval under section 412 of the Act. This initial agreement of October 20, 1958, was to be effective for a period of 1 year, and provided only

for so-called "windfall" payments.[1] The Board, without an evidentiary hearing,[2] approved this agreement subject to certain conditions, making its findings and conclusions upon written submissions and after full oral argument.[3]

Since that time the carriers have filed a series of nine amendments, the net effect of which has, in brief, (1) extended the Pact's duration so that it now continues indefinitely from year to year, subject to withdrawal by any party on certain prescribed prior notice;[4] (2) broadened strike coverage to include all strikes except those called to enforce demands equal to or less than the recommendations of a Presidential Emergency Board, or when the latter has issued a report without recommendations on the merits of the dispute, or where the struck carrier has acted in violation of the Railway Labor Act; (3) added carrier parties[5] and restricted parties to trunk carriers; (4) provided for arbitration of disputes relating to payments; and (5) added to the obligation to make "windfall" payments a requirement, if these do not equal 25 percent of the normal air transport operating expenses of the flight operations shut down, that each nonstruck signatory pay its proportionate share[6] to provide that minimum amount. The latter provision is contained in the so-called "supplemental payments agreement," and the liability of a carrier to make these "insurance-type" supplemental payments, unrelated to any direct competitive financial benefit to the nonstruck carriers, is exclusive of its liability to make "windfall" payments, but is limited in any 1 calendar year to an amount equal to one-half of 1 percent of its air transport operating revenues for the previous calendar year.

In its order instituting this investigation, the Board stated that it desired to examine in detail the expanded Pact and the operating experience gained under the original Pact, and referred to the fact that it had noted in the original order of approval that it did not have an evidentiary record against which to test the legality and desirability of the agreement or of operations under it. An evidentiary hearing has been held before Examiner S. Thomas Simon, who has issued an initial decision finding that the Pact should be approved,[7] subject to certain conditions.[8]

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[1] These are payments to the struck carrier of the other signatory parties' increased revenues attributed to the strike, less applicable added direct expenses, if the shutdown of flight operations occurred as a result of a strike which was called for reasons that included enforcement of demands in excess of or opposed to recommendations of a Presidential Emergency Board, or was called before the exhaustion of the prestrike procedures of the Railway Labor Act, or was "otherwise unlawful."

[2] An evidentiary hearing is not a statutory requirement for approval or disapproval of agreements filed under sec. 412.

[3] *Air Carrier Mutual Aid Pact*, 29 C.A.B. 188 (1959), and supplemental opinion on reconsideration, 30 C.A.B. 90 (1959).

[4] The party withdrawing remains liable, however, to make payments under the Pact for a period of 1 year after withdrawal to the extent it has received supplemental payments in excess of such payments made by it since Jan. 1, 1962.

[5] This amendment increased the total to 10, which was subsequently reduced to the present 8 signatories to the Pact, by the merger of Capital with United and the withdrawal of National.

[6] Established by the ratio of its air transport operating revenues for the previous calendar year to the total air transport operating revenues of the nonstruck carriers for the same period.

[7] He further found, on the precedent of the Board's prior approval of a similar agreement, that the arbitration agreement filed Oct. 11, 1960, is not adverse to the public interest nor in violation of the Act and should be approved, subject to the usual condition that "the approval granted shall not be deemed a determination of the reasonableness of the financial provisions of the agreement for future ratemaking or other regulatory purposes under the Act." No party challenges this finding and we find that the record warrants its adoption.

[8] In the main, these deal with accounting and reporting requirements and the filing of arbitration decisions and awards.

By order E–19796, July 11, 1963, the Board granted review of the initial decision, and since the union parties[9] (unions), the carrier parties[10] (carriers), and the Bureau have filed briefs to the Board, and oral argument has been heard, the case stands submitted for decision.

Upon consideration of the record and the contentions of the parties, we find that we are in agreement with the examiner's decision, except that we shall limit approval of the Pact to a period of 3 years. Accordingly, except to the extent modified herein, we adopt as our own the findings and conclusions of the examiner.[11]

Section 102 of the Act provides that the Board shall consider, among other things, as being in the public interest, the regulation of air transportation in such manner as to "foster sound economic conditions" in air transportation. The unions have pointed to a previous statement of the Board that this public interest includes the "attainment of a degree of stability and efficiency in air transportation that freedom from industrial strife will provide."[12] Although section 412 sets forth no specific procedural requirements, the Board undoubtedly has a duty to undertake to inform itself sufficiently with regard to any instrument filed thereunder to enable it to accurately and objectively apply the statutory tests. Different procedures are sometimes employed depending upon the nature of agreement under study and the attendant circumstances. This case, because of its complexity, novelty, and importance, and because there has been a period of experience, was appropriately referred to an examiner for a full evidentiary hearing. Our examination of the record, compiled in an exhaustive and thorough investigation, leads us to the view that the Pact meets the tests of section 412 and that it is not adverse to the public interest objectives of the Act, but that on the other hand is consistent therewith.

Air carriers are particularly vulnerable to strikes, and the industry has, in the recent past, been plagued by strikes. The Pact offers, at a not unreasonable cost for the protection obtained, a substantial measure of relief against the costs of strikes, in this fashion and to this extent contributing to industry stability.

The unions concede that the Pact does not violate specific mandates of the Railway Labor Act and in that sense does not constitute a violation of the Act. They contend, however, that the Pact is adverse to the public interest objectives of the Act because the record shows that it has defeated the spirit and the stated purposes of the Railway Labor Act (1) of avoiding interruptions to commerce or to the operations of any air carrier engaged therein, and (2) of providing for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions.

The Bureau sees in the obligation of the carriers to make supplemental payments a compulsive force tending to lead to possible violations of the Railway Labor Act, in that consultation among them and coordination of their bargaining positions, so strongly encour-

[9] Air Line Pilots Association, Air Line Dispatchers Association, Brotherhood of Railway and Steamship Clerks, Flight Engineers International Association, International Association of Machinists, and Transport Workers Union of America.

[10] American Airlines, Braniff Airways, Continental Air Lines, Eastern Air Lines, Northwest Airlines, Pan American World Airways, Trans World Airlines, and United Air Lines.

[11] A copy of the corrected initial decision is included herein.

[12] *Six-Carrier Mutual Aid Pact*, *supra* at 173.

aged by such obligation, may result in actual "forced" multiemployer or industrywide bargaining, whether or not employee groups agree. The Bureau contends that the supplemental provisions create such risk that union counter measures will result in prolonged or industrywide strikes, and thus so threaten the stability and efficiency of air transportation that the Board should find them adverse to the public interest.

With very few exceptions the contentions made by the Bureau and the unions are the same as those submitted to the examiner in the briefs below. The initial decision has dealt with them exhaustively, we agree with the examiner's disposition thereof, and it would serve no purpose to repeat in this opinion, even in summary fashion, the contentions made and the examiner's discussion and findings with respect thereto. We shall, accordingly, examine here only contentions advanced to the Board not covered in the initial decision.

The Bureau contends that the examiner appears to believe the Board powerless to disapprove the Pact, citing his statement that "a policy decision curtailing the use by air carriers of an economic weapon not invalid under the national labor policy, in the absence of a manifest substantial 'need,' would be an improvident exercise of discretion." [13] We do not read this statement as holding that the Board is powerless, and the examiner clearly affirmed the Board's authority where restrictions may be necessary to attain the public interest objectives of section 102.[14] Moreover, we do not agree with the Bureau that the examiner has negated any burden on the proponents to show need for the agreement.[15] He only set forth the circumstances which must be shown before disapproval is to be sustained on policy grounds.

The unions cite the language appearing in the margin,[16] as well as other findings in the initial decision,[17] which, they assert "seems to indicate that such decision placed the burden of proof upon the union parties to demonstrate that the deterioration occurring in labor relations in the airline industry could be attributable to that agreement." The unions claim that the initial decision erred in this respect and add: "Once the record demonstrates that there has been an aggravation of labor disputes and an increase in labor strife within the air transport industry under the Pact, it is submitted that there is a prima facie case that the Pact violates the public interest and that the burden then rests upon the carrier parties to demonstrate that this increase in labor strife cannot be attributed to the Pact."

In our opinion the bare fact that there may have been a deterioration in labor-management relations during the period of operation

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[13] Initial decision at 614 615.

[14] Initial decision at 610. Elsewhere the examiner stated that although the Board is not precluded from regulating labor-management relations in the industry, it should exercise extreme circumspection when acting within its sphere of authority over air transportation so as not to affect labor-management relations contrary to the national labor policy, unless it finds its action is required "by a serious transportation need in order to secure important public benefits." *Id* at 610.

[15] *See Local Cartage Agreement Case*, 15 C.A.B. 850, 852 853, 855 (1952).

[16] "Due to the obfuscation and uncertainty caused by the magnitude of the crew complement controversy, the record cannot be found determinative that the Pact has had an unexceptional influence upon the decisions of either the carriers or the unions in labor disputes, or has acted as a causative or a deterrent to strikes during the past 4 years." Initial decision at 627.

[17] *Id.* at 739.

of the Pact covered by the record does not raise a presumption that the deterioration was caused by the Pact, and such fact, standing alone, does not make out a "prima facie case" that the Pact violates the public interest. Furthermore, as the examiner found, the controversy between two unions over jurisdictional representation of flight crew members has been the primary cause of labor-management disputes, at least since 1958.

As an alternative to approval of the Pact the unions propose "that the gap between negotiations, during which misunderstandings arise, which makes ultimate settlement of differences difficult if not impossible, be occupied with joint management-labor conferences." However worthwhile this suggestion may be, it does not operate to relieve the Board of the obligation under section 412 to approve or disapprove the Pact. Nor does this proposal constitute a ground for finding it adverse to the public interest.

The years since creation of the Pact have not been typical either as to the industry, plagued with a capacity problem, or labor-management relations, preoccupied with the crew complement issue, and for this reason we shall limit approval to a period of 3 years.[18]

We have given due consideration to all the contentions of the parties, and find, except to the extent indicated, that they do not alter our decision herein.[19]

Accordingly, in view of the foregoing and all the facts of record, we find—

1. That the Pact is not adverse to the public interest but is consistent therewith and is not in violation of the Act and, therefore, should be approved for a period of 3 years from the date of the Board's order herein, subject to the following conditions:

(a) That it shall not be deemed a determination of the reasonableness of the financial provisions of the agreement for future rate-making or other regulatory provisions under the Act;

(b) That it shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

(c) That, in accounting for the amounts due to others and the amounts due from others under the Pact, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Chief of the Board's Office of Carrier Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the agreement as may be reasonably required by the Director of the Bureau of Economic Regulation;

(d) That copies of all arbitrators' decisions and awards issued under this agreement shall be filed with the Dockets Section of the Board within 15 days of service thereof on the carrier parties, and that briefs and other documents filed in the arbitration proceeding

[18] This is not to indicate that the Board is precluded from exercising its authority under sec. 412 of the Act to review the agreement at any time, whether or not it has been previously approved.

[19] In view of our decision to approve the Pact, we need not and do not pass upon the merits of the carriers' contention that Congress, in enacting certain statutes including the Railway Labor Act, has determined that mutual aid is in the public interest "and this Board has no discretion to decide otherwise."

by carrier parties be made available to the Board for examination upon request.

2. That the arbitration agreement (CAB 14622) filed October 11, 1960, is not adverse to the public interest nor in violation of the Act and should be approved, subject to the condition that the approval granted shall not be deemed a determination of the reasonableness of the financial provisions of the agreement for future ratemaking or other regulatory purposes under the Act.

3. That the investigation in docket 9577 should be terminated.

An appropriate order will be entered.

Boyd, Chairman, and Gurney, Member, concurred in the above opinion. Murphy, Vice Chairman, filed the following concurrence and dissent. Minetti, Member, filed the following dissent.

MURPHY, *Vice Chairman*, concurring and dissenting:

I concur in the holding of the majority to the extent that the "windfall" provisions of the Pact, appropriately limited and conditioned, should be approved but conclude that the "supplemental payments" provision should be disapproved prospectively, as recommended by bureau counsel.[1]

There is a valid basis in this record for reasonable apprehension that the supplemental payments provision may move labor and management in directions counter to the spirit and policy of both the Railway Labor Act and the Federal Aviation Act of 1958. In this day and age we cannot afford a widespread disruption of our national air transportation service. However, the provocation inherent in the supplemental payments provision makes such disruption likely in the judgment of the bureau counsel and other parties to this proceeding.

Moreover, this part of the Pact could subject a great deal of the rightfully earned revenues of a carrier with stable labor relations to transfer to a struck carrier whose labor policy may be neither prudent nor fair. This tax on earnings could distort the true financial picture of the industry as well as lead to the involvement of member airlines in the management policies of one another. Thus, a carrier could well be encouraged by the great imbalance in labor-management relations created by this provision to take an unreasonable position on a strike or strike threat, not only for its own advantage, but to present an industry position. Ultimately, involuntary joint bargaining may be imposed upon labor under the guise of single-carrier negotiations. If the unions react to organize and develop a counterbalance machinery, as they indicate in the record, the aggravation rather than the amelioration of labor disputes will eventuate with consequent harm to the public interest. Accordingly, I cannot approve this portion of the carrier agreement.

MINETTI, *Member*, dissenting:

I would disapprove the amended Pact in its entirety.

When the original Pact came before the Board for approval, I dissented from the decision to approve the agreement because of my

[1] All parties agree, in light of *Kennedy* v. *Long Island Railroad Company*, 211 F. Supp. 478 (S.D.N.Y. 1962), affirmed, 319 F. 2d 366 (2d Cir. 1963), certiorari denied, 375 U.S. 830 (1963), that the Pact does not *per se* violate any provision of the Railway Labor Act or the Federal Aviation Act.

belief that the Pact violated the Railway Labor Act, and that evidentiary hearings on the agreement were essential.[1] Evidentiary hearings have been held on the amended Pact for which approval is sought, and the union parties do not contend in the present case that the agreement violates the specific mandates of the Railway Labor Act.[2] Thus, the question before us here is whether the Pact is adverse to the public interest within the contemplation of section 412 of the Federal Aviation Act of 1958.

The public interest which we must consider is that spelled out and delineated in the Declaration of Policy of the Act. In its prior opinion on the Pact a majority of the Board stated:[3]

> • • • Matters of general policy as to labor disputes are not to be considered by the Board in assessing whether the agreement is adverse to the public interest. It is the function of Congress, and not of the Board, to weigh the wisdom of such agreements as a factor in the furtherance of labor policies not directly related to the promotion of a sound air transportation system. [Footnote omitted.]

However, it recognized, as indeed it was compelled to, that—[4]

> • • • The public interest which we must guard, though not broadly one of employee welfare, includes attainment of a degree of stability and efficiency in air transportation that freedom from industrial strife will provide. • • •

Further, in setting up the present case the Board indicated that it wished to consider "the possible impact of these arrangements on industry employment, stability, and related matters which it is the Board's duty to consider in weighing whether the agreements are consistent with the public interest."[5] This reflected the previously expressed concern with labor-management relations insofar as they may pose "a threat to the development of a stable and efficient air transportation system."[6]

I have no quarrel with these statements of our powers and duties under the Act. However, unlike the majority, my analysis of the matters before us convinces me that the amended Pact, when viewed against the background of the statutory standards, is not consistent with the public interest we are directed to protect and promote and should, accordingly, be disapproved.

Despite the wide divergence of views on numerous matters in this proceeding, there is uniform agreement on one thing: Labor-management relations in the airline industry for many years have been marked by instability as reflected in disputes and work stoppages, and such relations have shown significant deterioration during the period the Pact has been in effect. That this is so is not only conceded by all the parties, but is also borne out by the record before us, which discloses an alarming increase in both the number and duration of the work stoppages since the creation of the Pact.

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1 *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168, 179 (1959).
2 Since the time of the Board's original decision on the Pact, the courts have held that an arrangement between railroad companies providing for mutual assistance under an insurance-type plan does not constitute a *per se* violation of the Railway Labor Act. *Kennedy v. Long Island Rail Road Company*, 319 F.2d 366 (C.A. 2, 1963).
3 *Six-Carrier Mutual Aid Pact*, *supra* at 173.
4 *Ibid.*
5 *Mutual Aid Pact*, 31 C.A.B. 977, 979 (1960).
6 *Six-Carrier Mutual Aid Pact*, *supra* at 173.

The majority does not dispute that fact, and I am sure that they share my deep concern over the state of labor-management relations and the inestimable harm that repeated disputes and paralyzing strikes can do to the public interest. However, the majority if I correctly understand its position, is of the view that since the Pact does not violate the Railway Labor Act and is not inconsistent with national labor policy which permits the carriers to use mutual assistance as an economic weapon in the collective bargaining process, the Board, absent convincing proof that the Pact has been a causative factor in producing the labor unrest which has affected the air transport industry in the last few years or will produce such unrest in the future, either cannot or should not find the Pact adverse to the public interest.

In the light of the record here, I cannot accept this narrow view of our powers or our responsibilities under the public interest standards of the Act.

This record establishes beyond doubt that the unions from the outset have viewed the Pact as a direct attack on their bargaining integrity, and that this belief has been reenforced by the step-by-step process of amendment to broaden and extend the agreement both as to membership and coverage. It is not of critical importance whether the Pact was or was not so intended. The important thing is that the unions, not without some justification under the circumstances of the agreement's conception and expansion, have so viewed it.

Certainly no one could justifiably contend that all of the labor unrest that has occurred should be laid at the door of the Pact. Even less could it be contended that sole responsibility for the conditions that have come about should rest on management or labor. The important thing is that the Pact has created and nurtured a spirit of distrust that is destructive of the mutual confidence and respect which is essential to the successful negotiation and solution of problems in the emotionally charged atmosphere of labor-management relations.

The majority has accepted the examiner's finding that the evidence does not demonstrate a causative connection between the deteriorating labor-management relations and the Pact, or substantiate the predictions that the Pact will cause future labor unrest. To me, this is no answer to the problem before us.

I do not believe that this Board in fulfilling its responsibilities can close its eyes to known and critical facts. The Pact, intentionally or not, has from the outset created a picture of union irresponsibility and what, understandably, could and has been viewed by labor as union hostility. The unions have responded with matching mistrust. The attitudes of labor and management toward each other have hardened. And so there have evolved reciprocal manifestations of lack of confidence and trust which, even with good-faith bargaining on both sides, are destructive of that atmosphere which must prevail if the industry is to avoid the industrial strife that poses a direct threat to the development of a stable and efficient air transportation system.

I am not unmindful of the fact that a mutual aid agreement of the type here involved in and of itself is a proper collective bargaining technique under our national labor policy. But under the Act this Board is charged with the duty of promoting the public interest and the development of an adequate air transportation system. Where, as here, the present Pact constitutes a source of unrest and instability in labor-management relations which poses a definite threat to uninterrupted air transportation, I believe it is the Board's duty, absent any showing that such an agreement is required to avoid frustrating national labor policy, to disapprove the Pact. The record here shows no such need. The majority itself has found that the mutual aid pact is not required to give the carriers equality of bargaining power with the unions. Further, the record establishes that even without it the carriers who have suffered strikes have been financially able to withstand the work stoppages. On balance, therefore, I believe that the interest of the public in forestalling this threat of disruption of our important air transportation services must prevail.

The majority would limit its approval of the amended Pact to a temporary period in order that it may again look at the matter should the consequences which it concedes could come about, in fact, materialize. I believe that the stakes are too high to take this gamble with the public interest.

ORDER

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED—

1. That agreements CAB 12633A through AS (hereafter referred to in this paragraph as the "agreement") be and hereby are approved for a period of 3 years from the date of this order, subject to the following conditions:

(a) That the approval shall not be deemed a determination of the reasonableness of the financial provisions of the agreement for future ratemaking or other regulatory provisions under the Act.

(b) That the approval shall not affect the rights and obligations of the carrier parties, or of their employees, under the Railway Labor Act.

(c) That, in accounting for the amounts due to others and the amounts due from others under the agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Chief of the Board's Office of Carrier Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the agreement as may be reasonably required by the Director of the Bureau of Economic Regulation.

(d) That copies of all arbitrators' decisions and awards issued under the agreement shall be filed with the Dockets Section of the Board within 15 days of service thereof on the carrier parties, and that briefs and other documents filed in the arbitration proceeding by carrier parties be made available to the Board for examination upon request.

2. That agreement CAB 14622 be and hereby is approved, subject to the following condition:

That the approval shall not be deemed a determination of the reasonableness of the financial provisions of the agreement for future ratemaking or other regulatory purposes under the Act.

3. That the investigation herein be and it hereby is terminated.

Initial Decision of Examiner S. Thomas Simon

Found—

That the Mutual Aid Pact, as amended by agreements CAB 12633A through A8, is consistent with and not adverse to the public interest or in violation of the Act. The Pact is approved, subject to conditions.

That the arbitration agreement, agreement CAB 14622, is consistent with and not adverse to the public interest or in violation of the Act. The agreement is approved, subject to a condition.

This is an investigation, instituted pursuant to sections 204(a), 407, 412, and 1002(b) of the Federal Aviation Act of 1958, as amended (ACT), to determine whether the Mutual Aid Agreement, as amended (Pact), providing for mutual financial assistance in the event of a shutdown of the flight operations of one or more of its 10 air carrier signatories as a result of certain strikes, is consistent with the public interest, and not in violation of the Act.[1]

The initial Pact (agreement CAB 12633) effective October 20, 1958, for a period of 1 year, was approved by the Board on May 20, 1959, subject to certain conditions.[2] In the interval between the order of approval and the order of investigation, the Pact had been amended by seven agreements extending the duration, expanding the coverage, and adding carrier parties. Although filed pursuant to the provisons of section 412,[3] these amendments had not been acted upon by the Board.[4] Since the institution of this investigation, two additional amendments to the Pact have been filed with the Board and consolidated therein.[5] An agreement between the parties to the Pact to arbitrate a dispute concerning its applicability to a disruption of service suffered by Eastern Air Lines during June 1960 has also been consolidated in this investigation. (Agreement CAB 14622.)[6]

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1 Order E-15413, June 20, 1960, 41 C.A.B. 977. For convenience, Board orders relating to the Pact are summarized in appendix B.

2 Order E-13899, 29 C.A.B. 168; reconsideration denied, E-14563, 30 C.A.B. 90.

3 See appendix F, excerpts of pertinent statutory provisions.

4 Agreements filed pursuant to sec. 412(a) are effective without prior approval of the Board under sec. 412(b).

5 By Board order E-16081, Nov. 29, 1960, all amendments to the Pact filed prior to the closing of the record are consolidated in this proceeding. A summary of each agreement filed with the Board relating to the Pact is contained in appendix A.

6 Order E-16081, Nov. 29, 1960; petition for reconsideration, E-16821, May 17, 1961.

On March 7, 1960, the six signatories of the Pact[7] executed an amendment significantly broadening the coverage of the Pact to apply, with minor exceptions, to all shutdowns of flight operations resulting from strikes. Four carriers,[8] not previously members, adhered to the Pact as so amended, by executing counterparts during March and April 1960. On April 12, 1960, objections to the expanded Pact were filed with the Board by six airline transport unions,[9] acting severally and jointly by a committe, known as the Association of Air Transport Unions.[10] Either immediate disapproval or a full evidentiary hearing on all the issues raised by the Pact was requested.

An evidentiary hearing is not a statutory requirement for the approval or disapproval of agreements filed under the provisions of section 412 of the Act. In approving the original Pact, the Board had acted without an evidentiary hearing, making its findings and conclusions upon written submissions and after full oral argument.[11] In an opinion denying reconsideration of its order of approval, the Board rejected a request of the unions for an evidentiary hearing, indicating that it had been prompted to decide the matter in the first instance without an evidentiary hearing because of the absence of a request therefor, the desire of all the parties for a prompt decision, the position of the objectors that the agreement was illegal as a matter of law, and the exigencies of the strike situation which existed at the time.

However, the objection to the expansion of the Pact as a result of the March 7, 1960, amendment presented a different situation. The Pact had been in operation for more than 18 months and facts as to its operation were available. The Pact now comprised 9 of the 12 domestic trunk carriers and a large U.S. international carrier, accounting for approximately 90 percent of the revenue passenger-miles flown in the industry. The coverage of the Pact also had been expanded to include, for practical purposes, all strikes against a carrier party which had complied with the Railway Labor Act. Most importantly, the principle of mutual assistance among air carriers had emerged as a long-term policy with implications of great impact on labor-management relations and the public interest. Recognizing these factors, the Board found that a full evidentiary hearing would be desirable to completely reexamine the principle of mutual assistance as related

[7] American Airlines, Inc. (American), Eastern Air Lines, Inc. (Eastern), Pan American World Airways, Inc. (Pan American), Trans World Airlines, Inc. (TWA), United Air Lines, Inc. (United), and Capital Airlines, Inc. (Capital), merged with United June 1, 1961.

[8] Braniff Airways, Inc. (Braniff), Continental Airlines, Inc. (Continental), National Airlines, Inc. (National), and Northwest Airlines, Inc. (Northwest).

[9] Air Line Pilots Association (ALPA), Air Line Dispatchers Association (ALDA), Brotherhood of Railway and Steamship Clerks (BRC), Flight Engineers' International Association (FEIA), International Association of Machinists (IAM), and Transport Workers Union (TWU). United Automobile Workers (UAW) subsequently concurred in the filing.

[10] The Association of Air Transport Unions at the time was the name by which a committee appointed by the major air transport unions was known. Although on June 1, 1960, seven AFL/CIO unions under 9 experts announced the formation of an Association of Air Transport Unions (AATU) for the purpose of promoting cooperation and mutual [illegible] their unions and their affiliates, this association is not a formal party to this proceeding. The BRC formally withdrew from the association Nov. 1, 1960, but has continued to participate as a party to this proceeding. The AATU has been inactive since November 1960.

[11] The Bureau of Economic Regulation (Bureau) was not a party nor is there any evidence that it participated in this proceeding.

to the air transportation industry, to test its legality, to determine its effect upon the public interest, and to collate the operating experience gained.

In its order instituting the investigation,[12] the Board expressly rejected a contention of the carrier parties that the approval of the original agreement contemplated an expansion of the Pact. It also clearly pointed out the restricted scope of its approval, which was confined to an agreement limited in duration to 1 year. Accordingly, the investigation has been conducted upon the premise that the Board intended a *de novo* examination of the Pact not restricted by any previous finding as to the law or facts.[13]

For convenience, the nine amendments to the Pact may be considered as three separate agreements: (1) the "basic agreement,"[14] the initial six-carrier-party "windfall" agreement as amended to conform to the conditional approval of the Board (2) the "expanded agreement,"[15] the "windfall" agreement as amended by the March 7, 1960, amendment, increased to a 10-carrier-party "windfall" agreement with expanded strike coverage, and (3) the "supplemental payments agreement,"[16] an amendment dated March 22, 1962, retroactively effective December 31, 1961, substituting an entire agreement for the substantive provisions of the Pact, retaining the "windfall" concept but incorporating additional benefits in the form of mutual insurance.

The initial prehearing conference was convened on November 30, 1960. Counsel for the Bureau proposed a statement of issues and submitted requests for information which reflected a broad interpretation of the Board's order of investigation, in effect constituting a sweeping inquiry into the labor-management relations between the Pact members and their unions. The Bureau's statement of issues extended the investigation to include an inquiry into the "current and likely future plans" of the carrier parties on labor-management relations collateral to the Pact, principally sub-suming plans and programs on joint or industrywide bargaining and strike insurance.[17] Upon objection by the carrier parties, the examiner ruled that current and future plans of the carrier parties relating to labor-management problems other than those directly bearing on the Pact were outside the scope of the investigation. Because of the importance of the issue, the Bureau requested permission to appeal to the Board. This request was granted by the examiner and upon appeal the ruling was sustained by the Board.[18]

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[12] The air carriers listed in notes 7 and 8, *supra*, and the unions in note 9, *supra*, were made formal parties to the investigation by the Board. Although the order provided for the intervention of any organization designated as a collective bargaining representative of the employees of an air carrier, no interventions were filed. Because of the importance of the issues and the Board's "relative lack of expertise in this area," the Board issued invitations to the Commerce, Justice, and Labor Departments, the National Mediation Board, and the National Labor Relations Board to participate. None of these invitations was accepted even though the Departments of Commerce, Justice, and Labor were reinvited to participate after the insurance-type amendment was filed.

[13] As expressed in E 15413 "The investigation ordered herein will furnish a vehicle for complete examination of the issues previously considered by the Board * * *."

[14] See app. C.

[15] See app. D.

[16] See app. E.

[17] The disputed issue reads: "VII. What mutual labor-relations arrangements, other than the Pact itself, are developing in the industry?"

[18] Order E-16598, Mar. 31, 1961, 33 C.A.B. 1024.

The issues developed in conference, nevertheless permitted an extensive investigation of the Pact, its motivation, development, and operation. They also permitted a scrutiny of its past and probable influence on labor-management relations, as well as of its financial cost and impact. The legal issues included antitrust, Railway Labor Act, and public interest under the Act. The conclusiveness of the issues opened up to searching inquiry labor-management practices and procedures ordinarily closely guarded by the parties. Management and labor were placed in a position to request evidence and the production of records and documents pertaining to each other's labor-management policies and practices. The Bureau also was afforded an opportunity to scrutinize the records of the unions, as well as the carriers, and generally to inquire into their collective bargaining policies and practices. Consequently, problems were presented which were settled at a series of formal and informal prehearing conferences at which counsel for the carriers, counsel for the union parties, and counsel for the Bureau displayed highly cooperative attitudes. Counsel are to be commended for their forbearance from delving into many matters relating to emotional labor-management problems which, though relevant would have unnecessarily disturbed an explosive labor-management negotiation which was engaging the attention of the industry, labor, and the Government during the entire period. Notwithstanding, an exhaustive record was compiled with what is believed to have been a minimum of controversy and hurt to the parties.

The lengthy pretrial procedures, as well as the three formal hearings, were greatly facilitated by the filing of joint exhibits and the presentation of joint testimony by the carrier and union parties. The prosecution of the proceeding also was eased considerably by the utilization of common counsel with authority to speak for each side.[19] Although represented individually by counsel, 9 of the 10 carrier parties presented a single case. Similarly, the union parties' presentation was joint.

On the other hand, the pretrial procedures were complicated by the dynamic situation affecting labor-management relations in the industry. This was a period of labor unrest centered in the FEIA/ALPA jurisdictional controversy regarding the flight-crew complement, complicated by the major carriers' desire to reduce their four-man jet crews to three. This situation became critical upon the issuance of the report on January 17, 1961, of a special committee of three neutral public members appointed by the National Mediation Board, determining that all cockpit crew members on United comprised a craft or class for the purpose of common representation in collective bargaining.

On February 17, 1961, the flight engineers employed by the carriers listed in footnote,[20] fearing the loss of their jobs and the

[19] Union parties were represented by Mulholland, Roble, & Hickey. The firms of Covington & Burling, and Patterson, Belknap, & Farmer represented the carrier parties, except National, as common counsel. National was represented by Cross, Murphy, & Smith. "Carrier parties" as used in this decision hereinafter will refer to carrier parties represented by common counsel, excluding National.

[20] American, TWA, Eastern, National, Pan American, and Flying Tiger struck by FEIA Feb. 17-24, 1961, and Western Feb. 17, to May 11, 1961. Northwest had been struck legally previously by IAM on the same issue, Oct. 10, 1960, to Feb. 24, 1961.

fate of their union, went on an illegal concerted walkout, primarily seeking to reverse the decision of the National Mediation Board. The almost total shutdown of air transportation which followed, despite court injunctions, required the intervention of the President who, acting upon the recommendation of the Secretary of Labor, appointed a commission of three public members (Feinsinger Commission) to investigate and make findings and recommendations upon the controversy.[21] The unions and carriers (except Western) were induced to forego reprisals and to agree to maintain the *status quo* during the deliberation of the Commission. As a result, air service resumed on the carriers (except Western) February 24, 1961. During the prehearing stage, five Presidential Emergency Boards, created by the President under section 10 of the Railway Labor Act, issued reports on labor disputes of Pact members. The Pact itself was subject to an arbitration proceeding[22] relating to a dispute as to its coverage, and two signatories[23] withdrew therefrom, effective December 31, 1961.

Public hearings were held February 26 through March 14, 1962, at Washington, D.C. On March 26, subsequent to the hearings but prior to the closing of the record, an amendment (CAB 12633-A8) referred to herein as the "supplemental payments agreement," was filed with the Board.[24] This agreement was executed by eight carriers on March 22, 1962, retroactively effective December 31, 1961. While designated an amendment, this document was substantially a new agreement and represented a radical departure from the previous theory of mutual aid assistance based solely upon the "windfall" principle. As a supplement to "windfall" payments, it incorporated a provision for contributions by non-struck carriers to assure a minimum payment to a struck carrier. Issues previously irrelevant to the investigation became relevant and after a second round of pretrial procedures, the hearings were reconvened June 25-27 to take evidence on the broadened issues.

On June 23, 1962, the FEIA, EAL, chapter, struck Eastern, resulting in a complete shutdown of Eastern's flight operations. On August 31, the union parties filed a motion to reopen the record so that evidence could be received on the operation of the amended Pact during the strike in progress against Eastern. The motion was granted on September 13 and hearings were reconvened September 24 and 25 for the receipt of evidence limited to the operation of the Pact during the Eastern strike.[25] Briefs were filed November 29, 1962, and reply briefs on January 18, 1963.

SUMMARY OF BOARD OPINION ON "BASIC AGREEMENT"

Although the examiner has ruled that he is not bound by the findings of fact and conclusions of law of the Board in its prior

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[21] Executive orders 10921 and 10922, dated Feb. 21 and 23, 1961, respectively.
[22] Agreement CAB 14622—Eastern, arbitration opinion issued Dec. 31, 1960. There had been one arbitration prior to this period, agreement CAB 13454—American, arbitration opinion issued Jan. 20, 1960.
[23] Continental filed notice of withdrawal on Oct. 27, 1961. National filed notices of withdrawal on July 28, 1961, and Nov. 2, 1961.
[24] This agreement was consolidated into this proceeding by operation of the Board's order of consolidation E-16081, Nov. 26, 1962.
[25] Eastern resumed partial flight operation July 23, 1962, and full-schedule operation Sept. 13, 1962.

approval of the circumscribed "basic agreement," such findings and conclusions obviously are material and entitled to precedential value.[26] A summary of the views expressed by the Board would be extremely helpful at this time.

In the original agreement[27] six major air carriers[28] combined to provide financial assistance to a struck carrier, also signatory, by mutually agreeing to pay over to that carrier any increased revenues to the signatory carriers attributable to the strike, less applicable added direct expenses, provided a shutdown of flight operations occurred which was a result of a strike (1) to enforce demands in excess of or opposed to recommendations of a Presidential Emergency Board, or (2) called before the exhaustion of the prestrike procedures of the Railway Labor Act, or (3) otherwise unlawful. This agreement was limited to a period of 1 year and was open to adherence by any air carrier holding a certificate of public convenience and necessity.

As filed, the agreement contained a passenger referral clause:

> 2. The party suffering such a strike will make every reasonable effort, with its employees still on duty, to provide the public with information concerning all air services rendered by the other parties, and to direct to them as much of the traffic normally carried by the party suffering such a strike as possible, all as the best interests of the members of the public may require.

The Board found this clause to be not in the public interest since repugnant to antitrust principles.[29] The approval of the agreement was conditioned upon an amendment by the carrier parties deleting this clause.[30] No other antitrust implications were found, the Board being satisfied that there was no intent to monopolize and no significant lessening of competition either within the air transportation industry or between air carriers party to the agreement and other carriers.

As the initial step in determining whether the Pact violated the Act, the Board tested the Pact against the standards of the Railway Labor Act.[31] Section 401(k)(4) of the Act,[32] and section 201 of the Railway Labor Act[33] require compliance by air carriers with the procedures provided for the regulation of labor disputes under the Railway Labor Act and a violation of that statute would, *ipso facto*, constitute a violation of the Act. The Board rejected the contentions of the unions that the Pact violated section 2 of

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[26] But the examiner rejects the contention of the carrier parties that "in the absence of any evidence detracting from these conclusions, they are controlling." As discussed previously, the examiner has found that all issues of fact are open for *de novo* disposition on the record and that the Board's opinion does not constitute "the law of the case."

[27] See app. C.

[28] See note 7 *supra*.

[29] *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168, 174-175 (1959); see *Local Cartage Agreement Case*, 15 C.A.B. 850 (1952).

[30] Agreement CAB 12633A filed June 19, 1959.

[31] 45 U.S.C. 151-188.

[32] Sec. 401(k)(4)—(45 U.S.C. 1371) "It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended."

[33] Sec. 201 (45 U.S.C. 181) "All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service."

the Railway Labor Act,[34] finding that the Pact: (1) although increasing management's ability to withstand the economic impact of strikes, was not a repudiation of the carriers' obligation to bargain in good faith, nor did it interfere with the duty promptly to settle disputes, or to avoid strikes[35] (2) did not bring into a labor dispute carriers not parties to it, for the carrier involved in the dispute was free to bargain without reference to the view of other carrier parties, and the financial assistance accrued regardless of their approval or disapproval of its bargaining position,[36] and (3) did not violate the spirit or letter of section 10 of the Railway Labor Act[37] by seeking to induce the acceptance of the nonmandatory recommendations of Presidential Emergency Boards by the use of economic force.

Finding no violations of the Railway Labor Act, the Board assessed the Pact to determine whether it hindered the achievement of the objectives set forth in section 102 of the Act, which in labor matters it stated, include the "attainment of a degree of stability and efficiency in air transportation that freedom from industrial strife will provide." It restricted its scrutiny to a consideration of the effect upon the statutory public interest, excluding matters of general policy relating to labor disputes *dehors* the Act, the Board stating:[38]

> The range of our inquiry, however, is limited to a determination of the effect of the agreement upon these statutory objectives. Matters of general policy as to labor disputes are not to be considered by the Board in assessing whether the agreement is adverse to the public interest. [Footnote omitted.] It is the function of Congress, and not of the Board, to weigh the wisdom of such agreements as a factor in the furtherance of labor policies not directly related to the promotion of a sound air transportation system.

A contention that the Pact was against the public interest by interfering with the relative bargaining endurance of the parties was rejected by the Board which found that an imbalance of economic power between labor and management was not a factor to be considered unless the imbalance was so disparate as to "pose a threat to the development of a stable and efficient air transportation

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[34] 45 U.S.C. 151a, 152.

[35] Sec. 2. * * *

First. "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

[36] Sec. 2. Second. "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

[37] Sec. 10. (45 U.S.C. 160) "If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a Board to investigate and report respecting such dispute. * * * Such Board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

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"After the creation of such board and for thirty days after such Board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

[38] *Six-Carrier Mutual Aid Pact*, *supra* at 173.

system." Upon the record, the Board was unable to conclude that the industry "will be affected by such disparity in economic power as to jeopardize the attainment of the statutory objectives."

Although the Board recognized a lack of definitiveness in many respects, it rejected a union contention that the Pact should be disapproved because of ambiguity, finding it specific enough to be measured against the requirements of the public interest and of the Act.

The unions also urged that the Pact was against public interest in that it permitted subsidized carriers to become members. In the event a subsidized carrier should join the Pact, the subsidy provisions of the Act would permit Federal funds to be used to "break a lawful strike." In finding that the approval of the agreement would not adversely affect the mail-pay program, the Board noted that no subsidized carrier was a party to the agreement, and therefore it was unnecessary and undesirable to prejudge the "need" of an air carrier in a future mail-pay proceeding. It also pointed out that there had been no showing that the Pact presented problems incapable of satisfactory resolution in a section 406 proceeding.

For the purpose of retaining control of the agreement and preserving its ability to act freely in the public interest in the future, the Board conditioned its approval to provide: that its approval was not to be deemed a determination of the financial provisions of the agreement for the purpose of future ratemaking, or other regulatory purposes under the Act; that its approval was not to affect the rights and obligations of the carrier parties or their employees under the Railway Labor Act; and that monthly reports by each carrier party of all financial transactions under the Pact and special reports by a struck carrier during a strike must be filed with the Board.

The Board's order of approval was issued May 20, 1959. On October 19, 1959, the Board, in a supplemental opinion on reconsideration, affirmed its original decision and rejected a contention of the unions that its prior approval of the agreement had been in contravention of the statutory requirements of section 412(b) of the Act since predicated upon a negative finding and a failure of the objectors to sustain the burden of proof. The Board stated:[39]

> • • • Our decision to approve the agreement was based upon a conviction that, in the light of all circumstances, the objections fully unfolded upon an adequate record were lacking in merit. Accordingly, we must reject petitioners' argument insofar as it attributes our approval to subtle statutory phraseology or burden of proof. [Footnote omitted.]

"EXPANDED AGREEMENT"

On October 23, 1959, the carrier parties filed an amendment to the Pact, dated October 13, 1959 (CAB 12633-A1), extending the Pact until October 20, 1960.

On March 7, 1960, the six carrier parties to the agreement executed an amendment (CAB-12633-A2)[40] broadening the cover-

[39] *Six-Carrier Mutual Aid Pact*, 30 C.A.B. 90, 92 (1959).
[40] See app. D.

age of the Pact to provide "windfall" payments to a struck carrier when a shutdown of its flight operations was caused by a strike, called in the absence of the establishment of a Presidential Emergency Board and the struck carrier had acted in compliance with the Railway Labor Act. The practical effect of the amendment was to make the Pact applicable to almost all strikes against a Pact member. The strikes excluded were those called (1) to enforce demands equal to or less than the recommendations of a Presidential Emergency Board, (2) when an Emergency Board has issued a report without recommendations on the merits of the dispute, or (3) in a dispute in which the struck carrier has acted in violation of the Railway Labor Act. The amendment also removed a major objection to the Pact on the part of the smaller trunkline carriers which had been dubious of the creation of Emergency Boards in the case of strikes on their systems. After the execution of the amendment, 4 carriers[41] executed counterparts of the agreement, increasing the membership of the Pact to 10 carriers.[42]

On October 16, 1960, the parties executed an amendment (CAB 12633-A7) providing for the extension of the Pact to December 31, 1961, and thereafter from year to year, subject to withdrawal only on December 31 of any year upon 60 days' written notice or 30 days' written notice in the event a prior 60-day notice has been filed by another carrier party.

"SUPPLEMENTAL PAYMENTS AGREEMENT"

On March 22, 1962, 8 days after the close of the initial hearings in this investigation, the then carrier parties,[43] and Continental, executed an amendment (CAB 12633-A8)[44] effective retroactively December 31, 1961, substituting a new agreement for the prior "windfall" agreements. Although retaining the "windfall" principle as a primary factor for determining increased revenues and payments to a struck carrier, it provided for the supplementing of these payments, if below a minimum amount, by "insurance type" payments, the liability for which is unrelated to any competitive financial benefit.

The provisions of clause 1(B) of the "supplemental payments agreement" provide a struck carrier with a minimum payment (so-called standard amount) equal to 25 percent of the normal air transport operating expenses of the flight operations shutdown as the result of a strike.[45] If the "windfall" payments received by the struck carrier equal or exceed the standard amount, no supplemental payments are due. If less, then the nonstruck carriers are liable proportionately for payments to provide the standard amount. In any one calendar year the liability of a carrier for supplemental payments is limited to an amount equal to one-half of 1 percent of its air transport operating revenue for the previous

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[41] See note 8 *supra*.
[42] Agreements CAB 12633-A3, A4, A5, A6. See app. D.
[43] National and Continental had withdrawn from the Pact effective Dec. 31, 1961. See note 23 *supra*.
[44] See app. D.
[45] Computed on a daily basis determined by its average daily air transport operating expenses for the operation shut down (CAB accounts 5100-7000) for a period of 12 months immediately prior to the month the strike begins.

calendar year. The proportionate liability for supplemental payments is established by the ratio of its air transport operating revenues for the previous calendar year to the total air transport operating revenues of the nonstruck carriers for the same period. The liability of a carrier to make supplemental payments is exclusive of its liability to make "windfall" payments. Redistribution of the supplemental payments is provided for in the event that there are multiple strikes during any calendar year which would result in requirements in excess of the total liability. In this event, the supplemental payments are recomputed so as to provide each of the struck carriers with an equal percentage of the standard amount, except that a struck carrier may retain its "windfall" receipts.[46] A provision, lacking in previous agreements, provides for final and binding arbitration of a dispute among the carrier parties regarding the right to receive or make payments under the agreement.

The "supplemental payments agreement" also extends the prior coverage of the Pact to a shutdown of flight operations caused by a strike which occurs after a Presidential Emergency Board has been appointed but fails to make specific recommendations on the merits of the dispute and the struck carrier has acted in compliance with the Railway Labor Act.[47] Thus, the coverage of the Pact has been broadened to apply to all shutdowns due to strikes against a Pact member, except in instances in which the Pact member has acted illegally or has refused to accept demands equal to or less than those recommended by a Presidential Emergency Board.

Adherence to the Pact, formerly open to any air carrier holding a certificate of public convenience and necessity, is restricted to a trunk air carrier.[48] A trunk air carrier not a party prior to January 1, 1962, may adhere either on 6 months' notice or immediately, in which event it would be obligated to make all payments for which it would have been liable if a party since January 1, 1962, subject to the correlative right to offset payments which it would have received, but not greater than its liability. A member of the Pact prior to January 1, 1962, which withdraws, may adhere only by complying with the provisions requiring retroactive obligation.[49]

The agreement is effective from year to year but any party may withdraw from the Pact as of December 31 of any calendar year in accordance with the written notice provisions of the prior agreements. However, if a carrier has received supplemental payments in excess of such payments made by it since January 1, 1962, it remains obligated to make the payments required by the agreement to the extent of such excess for a period of 12 months after withdrawal.

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[46] For an illustration of redistribution see app. 1 to "supplemental payments agreement," app. E.

[47] Emergency Board 124 made no recommendation on the merits in the dispute between American and ALPA in December 1958 and January 1959, and this was one of the issues in the arbitration (agreement CAB 13454). Emergency Boards 135, 142, and 143 also made no specific recommendations on the merits of the crew complement controversy in their reports issued in June and December 1961.

[48] Trunk air carrier is undefined in the agreement.

[49] Since Continental executed the "supplemental payments agreement," this provision presently applies only to National.

SCOPE OF INVESTIGATION

The Board, in its order instituting this proceeding, indicated a desire for a full scrutiny of the effect of the Pact upon labor-management relations in the air transportation industry since its inception, the probable effect on these relations in the future, and the consequential impact on the public interest. It is believed that the record made by the parties, encompassing labor-management relations in the industry over a period of 16 years, provides adequate evidentiary material for the comprehensive analysis of the Pact deemed a requisite by the Board.[50]

ISSUES

The principal areas of investigation were resolved during the prehearing procedures and were reduced to six major issues:

1. Will the Pact itself, or operations under it violate any applicable provisions of the Railway Labor Act.

2. What effects have the Pact, or operations under it, had upon labor-management relations in the industry. What are the probable future effects of the Pact in this area.

3. Will the Pact discriminate in restraint of trade against other air carriers not parties to it.

4. What effect, if any, would payments to or by subsidized carriers have upon the amount of subsidy to be received by such carriers.

5. How has the Pact operated in the past, and how will it operate in the future, if approved.

6. Will the Pact cause, directly or indirectly, increased Government participation in labor-management disputes.

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[50] The examiner realizes that the Bureau was denied access to certain documents until the final stages of the hearing by a claim of confidentiality raised by the carriers based upon the attorney-client relationship. Counsel did not press their requests for these documents before the examiner, presumably having knowledge of the contents through another proceeding. On the final day of the hearing, the carrier parties withdrew their objection and permitted inspection of the contested documents by counsel for the Bureau, who, by stipulation, moved only one document into the record, BER-19. The examiner also recognizes that the Bureau was prevented from examining into the likely future, status of plans of the carrier parties relating, *inter alia*, to group bargaining and strike insurance by the examiner's exclusion of evidence on this issue during the first hearings in this proceeding. Strike insurance subsequently became an issue after the "supplemental payments agreement" was filed. The Bureau in its brief has argued for an "obvious connection between mutual aid and a group bargaining plan, both in fact and in mind of the industry" and points out that the Bureau has not waived its exception to the exclusionary rulings of the examiner which prevented counsel from introducing certain documents and cross-examining witnesses relating to the future plans of the industry toward group bargaining. The principal document denied introduction, BER-4, is a letter dated Sept. 11, 1958, from Stuart G. Tipton, president of ATA, to Paul W. Kayser, vice president—personnel of American, containing comments upon certain memoranda prepared by American's attorneys and executives relating to group bargaining and insurance plans. This document was moved by counsel during the initial hearings conducted prior to the filing of the "supplemental payments agreement" but was not re-moved at the subsequent hearings. Notwithstanding the examiner's exclusion of evidence relating to future plans, the record is replete with both documentary and testimonial evidence relating to the insurance program showing that certain carriers over a long period of time had coupled plans for insurance-type arrangements with plans for joint or industrywide bargaining. While plans relating to joint bargaining as they may have affected the adoption of mutual assistance agreements are properly relevant to this proceeding, an investigation into the possibility that such plans may come to fruition in the future is highly speculative. As a practical matter, the record shows that continuous attempts by certain carrier parties to obtain units among the carriers for joint or industrywide bargaining have been singularly unsuccessful in the past. Patently, an investigation into the future course of the carriers, both parties and nonparties to the Pact, requires a subjective probe into the intentions of management, which can better be determined after an overt act.

BURDEN OF PROOF

Before discussing the legal issues or the evidentiary record, the examiner believes it advisable to dispose of a disagreement which has been recurrent not only in this proceeding but in the previous proceeding before the Board, relating to the positioning of the burden of proof. The carrier parties argued that before the Board can disapprove an agreement under section 412(b) it must affirmatively find the agreement adverse to the public interest or in violation of the Act, and if unable to do so, the Board must approve the agreement. The Bureau has consistently maintained that the carrier parties, being proponents of the agreement "have the burden of going forward and producing such evidence to justify approval of the agreements." The union parties subscribed to the Bureau's position and in support thereof cite the findings of the Board in the *Airfreight Forwarder Investigation*[51] as authority. In that proceeding the Board said:

> The proponents of agreements providing for less compensation to direct air carriers for carrying air forwarder traffic than the rates paid by commercial shippers will have the burden of showing economic justification therefor. • • •

As previously noted, the Board on reconsideration of its order of approval of the Pact rejected the contention made in the petition of the unions that the Board had erroneously construed the provisions of section 412 as requiring only a negative finding that the agreement is not adverse to the public interest and approved the agreement on a determination based upon the absence of affirmative evidence of inconsistency with the public interest. In disposing of this argument the Board stated, *inter alia*:[52]

> • • • our decision was not predicated upon the niceties of negative as opposed to affirmative findings. By our procedure we allowed development of a full record concerning the meaning and effect of the agreement and, against this background and without indulging in any presumptions, arrived at the conclusion that the agreement accorded with the statutory criteria for approval.

In the opinion of the examiner, the burden of proof issue, while troublesome and not clearly resolved, poses no significant problem in this proceeding since the Board has unmistakably expressed its inten-

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[51] 21 C.A.B. 536, 558-559 (1955). It may be noted that in passing upon agreements which are repugnant to the antitrust laws, the Board has recognized a duty to "evaluate such agreements in the light of antitrust policy and principle" and that "approval should not be granted unless there is a *clear showing* that the agreement is required by a serious transportation need or in order to secure important public benefits." [Emphasis supplied.] *Local Cartage Agreement Case*, 15 C.A.B. 850, 853 (1952); *Cf. United-Western Interchange*, 1 C.A.A. 725, 728 (1940), relating to public interest considerations of secs. 412 and 408: "Insofar as the 'public interest' is concerned, the expressions 'adverse to' and 'not consistent with' have essentially the same meaning, and the same considerations, therefore, will govern the Authority's decision with respect to the 'public interest' under both sections." Also, *Through Service Proceeding*, 12 C.A.B. 266, 268 (1950), and cited cases thereto; *Eastern-American Agreement*, 34 C.A.B. 828 (1961), (dictum—effect of disapproval under 412(b)).

[52] *Six-Carrier Mutual Aid Pact*, 30 C.A.B. 90, 92 (1959); additional quotation *supra* at 582. But *see Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168, 177 (1959). "• • • in performing our statutory function, we may do no more than measure the agreement against these standards in order to ascertain whether its effect would be so detrimental as to endanger achievement of the objectives laid down by section 102 of the Act. • • • Within this framework, the Board's order follows from the lack of any affirmative showing that the agreement is adverse to the objectives specified by the Congress."

tion that the agreements should not be approved unless found consistent with the public interest. It is evident also that, although the carrier parties have raised the issue, they have not pursued it vigorously nor have they placed any substantial reliance thereon, apparently interposing this contention so as to preserve the question. Similarly, the union parties have raised the issue but have presented a case directed to prove affirmatively that these agreements are adverse to the public interest.[53]

The provisions of section 412(a) of the Act are quite broad, requiring the filing of working arrangements, as well as the usual "pooling" agreements, which must be approved under the provisions of similar statutes regulating transportation industries.[54] The filing of numerous agreements relating to uncontroversial, routine business transactions presenting no particular public interest questions is required.[55] In matters of this character, an inference of consistency with the public interest arising from the statutory language of the section might reasonably be implied. Obviously, however, the agreement in issue is not a routine business transaction and by its scope would negative the application of an inference of public interest even though the section were to be so construed. The agreement involves a combination of the major trunk air carriers in the industry and its subject matter impinges upon the labor-management relations between these carriers and their labor associations. Manifestly, an agreement of this importance may affect the stability and efficiency of a sound air transportation industry. Considering the statutory immunities which follow from an approval under this section, it is extremely doubtful that Congress ever intended the section to imply a presumption of public interest to agreements of this import.[56]

Although the language used by the Board previously may be susceptible to varying interpretations,[57] the intention of the Board that the agreements in issue in this investigation should not be approved until shown to be consistent with the public interest, appears beyond question. The Board in the order instituting this investigation significantly has expressed the purpose of the investigation in language other than the statutory standard of section 412(b), "* * * to determine whether the Pact, as amended, is consistent with the public interest and not in violation of the Act." It would be a grave underestimation of the Board and its staff to attribute the use of this language to inadvertence or to an inartistic statement of the statutory standard of section 412(b).

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[53] As will be discussed, *infra*, the Bureau, however, has rested its principal argument that the "supplemental payments agreement" is inconsistent with the public interest objectives of sec. 102 upon "tendencies" and "risk" to the public interest, which it alleges the carriers have failed to justify in the public interest. The Bureau's position puts the burden of proving that the agreements are not adverse to the public interest upon the carriers, in effect, imposing an inference that the "supplemental payments agreement" is *per se* adverse to the public interest.

[54] Compare, 49 U.S.C. 5, 5(b); 46 U.S.C. 814; 47 U.S.C. 211; also 49 U.S.C. 320, 913.

[55] See part 289, Economic Regulations of the Board, providing exemption from filing under sec. 412(a) of agreements of route air carriers for ground services and facilities, but not constituting an approval so as to bring sec. 414 into operation.

[56] *Accord*, order of disapproval, Air Transport Association, E-19260, issued Jan. 31, 1963; *McManus v. C. A. B.*, 286 F.2d 414 (2d Cir. 1961), certiorari denied, 366 U.S. 928.

[57] See *Air Carrier Mutual Aid Pact*, 30 C.A.B. 90, 93 (1959), dissenting opinion of Member Minetti.

ANTI-TRUST CONSIDERATIONS

Because of the interrelationship of the provisions of section 412(b) and those of 414, which, *inter alia*, provides immunity to the antitrust laws of agreements approved under section 412, the Pact must be evaluated to determine whether the agreement contains any element which would infringe upon either the policy or principles of the antitrust laws.[58] Although a major issue in this proceeding, neither the Bureau nor the union parties has contended that either the agreement itself or the transactions conducted by the parties pursuant thereto, present any substantial question relating to the restraint of competition or other repugnancy to the antitrust laws.[59]

The Board in its approval of the original Pact found that, except for the passenger referral clause the removal of which was made a condition of approval, there were no restraint of trade implications in that agreement.[60] It found that the agreement arose out of business requirements without any intent to monopolize or lessen competition either between the parties to the agreement or between them and any other air carriers or carriers. The evidentiary record supports the Board's original conclusion in this respect, being devoid of any evidence of transactions by the parties to the Pact in restraint of trade or otherwise repugnant to the policy or principles of the antitrust laws. In practical effect, it may be conceded that mutual assistance, rather than having a tendency to restraint competition, tends indirectly to foster it. Regardless of the motivation for or the principle objectives of the Pact, its effect is to keep viable a competitor.

The agreement approved by the Board permitted any air carrier holding a certificate of public convenience and necessity to participate as a party, whereas the "supplemental payments agreement" restricted participation to trunk air carriers holding certificates of public convenience and necessity. The established Board policy requires cooperative arrangements among a large group of air carriers to permit the participation of other air carriers upon an equitable basis.[61] Neither the union parties nor the Bureau has contended that the adherence provision of the "supplemental payments agreement" violates this principle. The evidence also supports a finding that the adherence provision was adopted for practical business reasons without evident intention to monopolize or lessen competition. The principal air carriers excluded, the feeder carriers, had shown no interest in adhering to the Pact in the past and their inclusion, while not materially strengthening the Pact in its ultimate objectives, would have presented difficult problems of "windfall" determination and

[58] See *McLean Trucking Co. v. U.S.*, 321 U.S. 67 (1943); *Cf. Isbrandtsen v. United States*, 211 F 2d 51 (D.C. Cir. 1954), certiorari denied 347 U.S. 990 (1954).

[59] *Accord, Kennedy v. Long Island Railroad Company*, 211 F. Supp. 478 (S.D.N.Y., 1962) in which Ryan, Chief Judge, found no Sherman Act implications in a strike insurance plan entered into by a group of railroads, including the Association of American Railroads. In that case it was contended, inter alia, that the insurance arrangement of the railroads was a pooling of resources by competitors "to fix the price which it will pay for the essential ingredient of labor" in contravention of the Sherman Act, sec. 1, (15 U.S.C. 1). The court found that under sec. 17 of the Clayton Act (15 U.S.C. 17) "the labor of a human being is not a commodity or article of commerce" and therefore the strike insurance program could not constitute a "restraint on commercial competition."

[60] *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 169, 175 (1959).

[61] *Air Cargo, Inc., Agreement, Petitions*, 9 C.A.B. 468, 469 (1948).

would have injected substantial subsidy questions.[82] While certain conditions are placed upon adherence to the Pact, there have been no objections registered to them and they appear to present no substantial antitrust considerations.[83]

The examiner finds that the Pact has not operated in restraint of trade or lessened competition between air carriers or between air carriers and other carriers and that the agreement *per se* does not contravene the policy or principles of the antitrust laws.

EFFECT ON SUBSIDY PROGRAM

The effect of payments under the Pact to or from a subsidized carrier upon the subsidy program under section 406 of the Act, although an issue, also was conceded to be of little import in this proceeding. Presently, no subsidized carrier is an adherent to the Pact. Since membership is limited by the latest amendment to trunk air carriers, the contingency that a signatory of the Pact would become a subsidized carrier appears remote.[84] Nevertheless, this possibility cannot be completely ignored when considering whether approval of this agreement is in the public interest. The omission of discussion and argument by the parties in their briefs on this subject is significant, implying that the Bureau and the parties rely upon the Board's previous determination of this issue.

In its prior decision, the Board was unable to find that the approval of the agreement would adversely affect the mail-pay program, stating:[85]

> Upon consideration of the opposing contentions, the Board is unable to find that approval of the agreement will adversely affect the mail-pay program. First, we note that no subsidized carrier is now a party to the agreement. The payments decried by the unions are thus at this juncture wholly conjectural, and may never occur. Secondly, we do not believe that it is either necessary or desirable to prejudge in this proceeding the precise treatment for mail-pay purposes to be accorded payments under the agreement. The factors bearing upon a carrier's "need" for subsidy are varied and complex, and can be ascertained only after exhaustive examination of factual data. The record before us contains no more than fleeting references to the general problem. In the absence of any showing that the agreement presents problems incapable of satisfactory resolution in a subsidy case, we are unable to find that mail-pay considerations require disapproval of the agreement.
>
> In keeping with our usual practice in approving agreements under various sections of the Act other than 406, we will provide that the approval granted herein shall not be deemed a determination of the reasonableness of the financial provisions of the agreement for future ratemaking or other regulatory purposes under the Act. [Footnote omitted.]

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[82] It is also recognized that the mutual aid agreements prior to this amendment technically would have permitted supplemental air carriers holding certificates of public convenience and necessity to adhere to the Pact.

[83] The adherence provision (clause 21 of the "supplemental payments agreement" was patently designed to induce two carriers which had withdrawn from the Pact (National and Continental) to return thereto. Continental did so, and the provision allowing adherence to the Pact by members prior to Dec. 31, 1962, only upon assuming retroactive obligation, applies solely to National at this time. However, the provision is general in nature and would probably be applicable to a future withdrawal of a party.

[84] However, this is not wholly outside the realm of conjecture. The examiner takes official notice of the fact that Eastern Air Lines has presently pending a request for subsidy for the year 1962, in the amount of $25,925,000. Also, that Capital Airlines made application for subsidy in March 1960, and the Board approved a merger of that carrier with United invoking the "failing business" doctrine. (Order E-16605 decided Apr. 3, 1961, 33 C.A.B. 307.)

[85] *Big Carrier Mutual Aid Pact*, 29 C.A.B. 168, 176-177 (1959).

Since this statement, the Board has had an opportunity to review a "windfall" payment made pursuant to the Pact by a subsidized air carrier in a determination of mail pay under section 406.[66] The claim of Pan American for an item of expense of $607,000 paid under the Pact to carrier parties in 1958, was disallowed in an order to show cause issued by the Board,[67] setting the final mail rates for that carrier.

This item of expense represented "windfall" payments made under the Pact and was found to have been made contrary to the criteria set forth by Congress in section 406 of the Act. The Board stated (*id.* at 555):

> • • • We have not previously passed upon the question of recognition of this precise type of reported expense for subsidy purposes, but, upon consideration of the various matters involved, it is our conclusion that the underwriting with subsidy of the mutual-aid-pact expense reported by PAA would not be consistent with the criteria set out by the Congress in section 406 of the Act. The mutual-aid payments are in effect insurance payments against possible strike losses, whether or not the fault of PAA management. On this basis, the payments should be disallowed because they are made without reference to the statutory standard of "economical and efficient" management. In reaching this conclusion, we decide only the narrow issue before us involving the payment made by PAA; nor do we pass upon the validity or propriety of the agreement for any purpose at this time other than the discharge of our duties in the fixing of mail compensation under section 406 of the Act.

Although expressing disagreement with the Board's disposition of the mutual aid payments, Pan American has accepted the final rates set forth in the Board's order as a settlement of all pending subsidy mail-rate cases.

That past strike losses of a carrier must be considered by the Board in determining the "need" of the carrier under the provisions of section 406, is no longer open to question.[68] In a section 406 proceeding the Board must determine the "need" of the carrier in complete disregard of the consequential effect of its determination on a labor dispute. Analogously, it would appear that payments under the Pact would be considered in a section 406 proceeding under the criteria of that section solely. It is assumed, therefore, that the expression of opinion by the Board in this instance is limited specifically to the matter under consideration. If, *arguendo*, it is accepted that this specific finding may presage that the Board would disallow mutual aid payments *per se* as not made in the exercise of "honest, economical, and efficient" management, even then, the examiner is unable to find any public interest considerations inherent in this determination. The "windfall" payments of the agreement are directly keyed to revenue, and the liability for supplemental payments is limited for any 1 year to a finite amount measured in relation to the previous

[66] Pan American did not become a system-wide subsidy-free carrier until Jan. 1, 1959.
[67] *Pan American Mail Rate Case, Renewed*, 35 C.A.B. 540 (1962).
[68] *American Overseas Airlines v. Civil Aeronautics Board*, 274 F.2d 744 (D.C. Cir. 1958). In this proceeding the court reversed the Board's determination and remanded the matter for an examination of the "need" for mail pay for past strike losses under the statutory criteria of sec. 406. The Board had disallowed strike losses on the grounds of public policy, stating: "We refuse to underwrite losses attributable to a labor controversy without regard to responsibility therefor." The court, citing the Supreme Court decision of *Bammerschlag v. Civil Aeronautics Board*, 307 F.2d 240 (D.C. Cir. 1951), affirmed sub nom. *Western Air Lines v. C.A.B.*, 347 U.S. 67 (1954), rejected the Board's decision as grounded upon public policy factors the Act and found that sec. 406 "does not permit mail pay to depend upon government policies in labor disputes."

year's revenue. Under these circumstances, the probability of a subsidized trunk air carrier being injured to the extent that, in the event of disallowance of these payments, it would not be able to comply with its statutory obligations under the Act, is practically unforeseeable.[69] Conversely, receipts by a subsidy carrier would reduce its "need" under section 406.

In principle, at least insofar as subsidy questions are concerned, there is no substantial distinction between "windfall" payments and supplemental payments. Both would be subject to scrutiny by the Board in an open-rate proceeding to determine whether the payments were made in the exercise of "honest, efficient, and economical" management.[70] As previously stated by the Board, the agreement raises no "problems incapable of satisfactory resolution in a subsidy case" in which the individual factors relating to a carrier's "need" must be evaluated upon specific factual data.

BOARD PARTICIPATION IN LABOR DISPUTES

The degree to which the Board's participation in labor-management disputes has or will be affected by the Pact is an issue in this investigation. No serious contention that the Pact has or will increase the participation of the Board in labor-management disputes has been advanced by the unions. The evidentiary record is devoid of evidence that the Pact has had any effect, one way or the other, upon the extent of the Board's participation in either labor disputes or labor-management relations, in general. Except for the institution of this investigation, the filing of two arbitration agreements, and the ione instance in which it considered the effect of mutual aid payments in the Pan American rate matter, the workload of the Board has not been affected in any way traceable directly to the mutual aid agreements.[71] If past experience may be taken as an indication of what may be expected in the future, it would appear that the Board's participation in labor-management disputes because of the Pact will similarly be inconsequential.[72]

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[69] The Bureau's brief in discussing a different problem shows that based upon the assumption that the "supplemental payments agreement" would have been in effect during 1961, and relating the liability for supplemental payments to the operating profits of the Pact members for 1961, the carriers' liabilities for supplemental payments would have ranged from 0 to 15 percent of the operating profits of those carriers which made a profit during 1961, and would have increased the operating losses for Eastern by 7 and TWA by 15 percent. Compare, appendix H, wherein actual mutual aid payments to net income ratios are computed for 1962—mutual aid payments of the paying carriers total 42 percent of their reported total net income, of which 26 percent represents supplemental payments.

[70] In making this finding, the examiner has taken into consideration the correlation between "windfall" payments to increased revenue and the absolute liability for supplemental payments and can distinguish no real difference in the ultimate effect upon the profit or loss of the paying carrier. The Bureau, however, in arguing against the approval of the "supplemental payments agreement" as tending to violate the Railway Labor Act apparently has adopted the rationale implied in the Pan American rate settlement—that the absolute liability for supplemental payments represents an abdication of control by management and by a parity of reasoning, it is inferred, would contend that supplemental payments are *per se* not made in the exercise of honest, efficient, and economical management.

[71] The examiner does not agree with the union parties' claim that the strike against Southern (1960 61) and Western (1961) which resulted in petitions for enforcement under sec. 401(k)(1) of the Act were an indirect result of the Pact. *Airline Pilots v. Southern Airways, Enforcement*, 36 C.A.B. 430 (1962); complaint dismissed. *Flight Engineers v. Western Air Lines*, 34 C.A.B. 831 (1961).

[72] *But see*, note 80 *infra*, and the Bureau's argument, *infra*, that increased labor strife envisioned as resulting from the operation of the "supplemental payments agreement" will tend to draw the government into intervention of labor disputes in general.

In addition, it is difficult to foresee how the agreements would involve the Board in labor-management disputes over and beyond that which would result from the exercise of its statutory responsibilities. Disputes between members of the Pact over payments thereunder are by its terms referable to final and binding arbitration procedures. Third-party complaints related to the operation of the agreement would necessarily involve violations of the Act or of the Railway Labor Act and the Board would have jurisdiction regardless of the mutual aid agreements.

Notwithstanding its professed "lack of expertise" in labor-management relations,[73] the Board, in exercising its statutory responsibilities under the Act, has been forced to assume jurisdiction over some labor-management relations and to settle labor disputes.[74] In performing its functions under title IV of the Act, particularly when approving transfers of routes,[75] mergers, and acquisition of control,[76] and interchange agreements,[77] the Board has attached conditions to its actions which directly affect labor-management relations and, as a consequence, has had to adjudicate problems going to the heart of labor-management controversies.[78] Recently, the Board took jurisdiction over a complaint filed pursuant to sections 410(k)(4) and 1002(a) of the Act, alleging, inter alia, violations by an air carrier (not a party to the Pact) of the Act and title II of the Railway Labor Act.[79] Although complaints of Railway Labor Act violations against air carriers have been filed as far back as 1946, this is the first complaint on which the Board has reached a decision on the merits.[80] In this proceeding, docketed as a petition for enforcement,[81] the Board found the carrier to have failed to bargain in good faith with the representatives of its employees as required by section 2, First, of the Railway Labor Act, and that continued refusal of the air carrier to comply with its obligation under the Railway Labor Act to bargain in good faith, would subject its certificate to suspension or revocation pursuant to section 401(g) of the Act. In reviewing the basis for the Board's jurisdiction, it stated:

> While the exact role the Board is to play in the enforcement of obligations placed on air carriers by the Railway Labor Act is unsettled [82]—and

[73] See order of investigation E-15413. The court as recently as 1960 also recognized that "the Board's experience and expertise is with transportation not labor relations problems." *Outland* v. *C. A. B.*, 284 F.2d 224 (D.C. Cir. 1960).

[74] *Cf. United States* v. *Lowden*, 308 U.S. 225 (1939).

[75] *E.g., United-Western, Acquisition Air Carrier Property*, 11 C.A.B. 701 (1950).

[76] *E.g., United-Capital Merger Case*, 33 C.A.B. 567, 622-631 (1961) (cases cited).

[77] *E.g., Capital-National Interchange*, 10 C.A.B. 251 (1949).

[78] *Western Air Lines* v. *Civil Aeronautics Board*, 194 F. 2d 211 (9th Cir. 1952); *Kent* v. *Civil Aeronautics Board*, 204 F. 2d 263 (2d Cir. 1953); *Danielson* v. *Civil Aeronautics Board*, 204 F. 2d 266 (2d Cir. 1953); *Outland* v. *C. A. B.*, 284 F. 2d 224 (D.C. Cir. 1960).

[79] See note 81, *infra*.

[80] The examiner takes notice that there are presently pending before the Board two complaints involving alleged violations of the Railway Labor Act, stemming out of the recent controversy between the flight engineers and carriers signatory to the Pact—TWA, EAL Chapt. v. EAL, docket 11009 (petition for Enforcement filed Jan. 22, 1963); and a complaint presently not docketed as a petition for enforcement filed Jan. 9, 1963, (docket 14273) wherein a group of individual members and former members of the IAM have filed a joint complaint against Northwest.

[81] *Airline Pilots* v. *Southern Airways, Enforcement, supra*. Members Gurney and Gillilland dissenting, also E 18757, Aug. 27, 1962, and E 19162, Jan. 3, 1963, 37 C.A.B. 57[illegible], wherein the Board exercised its jurisdiction concurrently with the court under the R.L.A. making findings of fact and law at variance with those of a U.S. district court judge, sitting at Nashville, Tenn., in a proceeding between the same parties and bearing on the same subject matter. Petition for review of the Board's order is *pending, sub nom, Southern Pilots Association* v. *C. A. B.*, 323 F. 2d 288 (D.C. Cir. 1963).

> the legislative history of Section 401(k) is of little or no help—we agree with the Examiner's conclusion that the Board must proceed on the premise that it was the intent of Congress that the Board in appropriate cases is the forum to hear and determine complaints alleging violation of such obligations by air carriers. [Footnote omitted.]

Although it appears that the Board is being drawn deeper into labor-management relations, this involvement is not attributable, either directly or indirectly, to the influence of the Pact.

SUMMARIES OF POSITIONS AND ARGUMENTS

The briefs and reply briefs filed with the examiner narrow considerably the issues remaining for decision. The interested parties and the Bureau were unrestricted in the lengths of briefs or replies and have comprehensively discussed the salient facts and the applicable legal questions arising out of the agreements. At the risk of over simplification and inadvertent misrepresentation, inherent in summarization, the positions and the major arguments of the parties, as finalized in the briefs, will be outlined.

BUREAU POSITION AND ARGUMENT

The Bureau takes the general position that the Pact, as amended, with the exception of the supplemental payments provision [clause 1(B)] of the amendment of March 22, 1962, should be approved for a period of 3 years, subject to a limitation of "windfall" payments [clause 1(A)] to a struck carrier to an amount not to exceed its actual operating expenses incurred during the strike period, less any earned revenues. The rationale of the Bureau's position is given in its brief as follows:

> Carriers should be permitted to attempt to improve their collective bargaining ability unless such efforts are adverse to the public interest or clearly tend toward violation of the Railway Labor Act. The evidence adduced of operations under the Pact since its inception in 1958 is, in our judgment, inconclusive. Because of the many *ad hoc* factors involved in the labor disputes which have occurred since then, it is not possible to pinpoint the effects of the Pact on the stability of air transportation. Under these circumstances, we find no compelling reason to depart radically from the Board's action in approving the original Pact.

It recommends a continuation of the reporting provisions now required by the Board's order of approval; *i.e.*, monthly statements of financial transactions by Pact members, and, in addition, to "assure restriction of the amount of Pact payments," a requirement that a struck carrier must within 40 days after a strike period, report the revenues earned and received, the actual operating expenses, total expenses incurred, and depreciation and amortization, all in terms of CAB functional accounts. In order to make the filing of required reports "self-implementing," it is recommended that the filing of reports be made "a condition precedent to the receipt or retention of payments."

The Bureau finds that the record indicates a need for a uniform method "for determining the revenues attributable to strikes and

the applicable added direct expenses incurred by nonstruck carriers." As reasoned by the Bureau:

> To the extent that there are areas of disagreement among the carriers, the possibility is created of conscious or inadvertent manipulation of revenues, expenses, and payments. This possibility is inconsistent with the concept of a definable limit on windfall receipts and Board review of that limit.

Claiming that a uniform method is feasible, the Bureau recommends, as a condition to the approval of the agreement, that the Pact members agree to and submit a provision for a uniform method of calculating "windfall" payments within a period of 30 days thereafter. Although the supplemental payments provision should be disapproved and "windfall" limited, the Bureau does not recommend that the disapproval of the Board should have retroactive application. It interprets the terms of the agreement to require repayments only "to the extent that they are affected by the terms of such approval" and that, therefore, the Board by making its approval prospective, can determine the repayments necessary to effect equity and justice between the parties.

The Bureau's arguments supporting its position are summarized in its brief and, in the interest of accuracy, will be quoted verbatim:

> The Bureau's chief objection to the Pact as presently written is that it obligates carriers who may not compete with a struck airline and who may have no direct interest in its labor problems to make substantial payments to the struck carrier even though the paying carrier receives no direct benefits from its payments or from the strike. Payments out of revenues realized as a result of the strike—the so-called "windfall payments"—do not suffer from this vice, since such sums are payable only to the extent that additional revenue is earned. The Bureau believes that the supplemental payments provision presents too great a danger of implementation in a fashion repugnant to the public interest.
>
> Supplemental payments must be made regardless of the paying carrier's profit position. As a result of the unqualified obligation to stand ready to pay over up to the limit of liability based on past earnings, the viability of a paying member can be seriously and adversely affected. This being true, sound management principles would not appear to allow a carrier to place itself in such a position without its having, and exercising, the right to participate in the negotiating policy discussions leading up to another carrier's decision to take a strike. However, the record in this proceeding does not indicate that there has been participation among Pact members in consultations on the advisability of another's accepting a strike (nor is there evidence that such consultations are contemplated). We do not think it would be in the public interest for the Board to approve a carrier's management, in effect, delegating to another the right to commit the former to substantial and onerous obligations, especially when this must be done without policy guidance, consultation, or review.
>
> Nor could the carriers revise their agreement to provide for such guidance, consultation, or review; for to do so, in the absence of a concurrence therein by the labor organization involved, would tend to bring about the substance of multiemployer or industrywide bargaining. Both the National Mediation Board and the Civil Aeronautics Board have held that, while the Railway Labor Act does not expressly preclude such bargaining, the bargaining unit must be agreed to by both management and labor. And, even without prior consultation among paying carriers, the supplemental payments provision logically leads the Pact members into a position of multiemployer or industrywide bargaining, whether or not employee groups agree. This tendency results from the fact that a car-

rier which is facing the prospect of making substantial out-of-pocket contributions will very naturally expect the recipient to maintain bargaining positions consistent with its own views.[14]

Moreover, the fact that carriers are able to tap the economic resources of others in the industry to withstand the impact of strike losses will, over the long run, encourage labor organizations to plan their labor negotiations in such a way as to equalize their relative economic position. The most obvious possibility is simultaneous strikes against several or all of the Pact members. In this sense, then, the Pact tends to force labor organizations into multiunit bargaining in violation of the Railway Labor Act.

Further, and entirely apart from possible Railway Labor Act violations, the supplemental payments provision appears to be inimical to the public interest in the possibility that it holds forth of longer and more widespread strikes. In attempting to place themselves in an improved bargaining position, the Pact members could have chosen any benefits level of supplemental payments, and so, the level which they did choose must be one which they felt would reasonably achieve their objectives. One objective is, of course, to enhance the ability to withstand strikes. The increased Pact benefits, through supplemental payments, will, we believe, enable a carrier to do so for a longer period than it could under the pure "windfall" theory. In such circumstances, the Pact creates the real possibility of countermeasures by the union which might result in prolonged or industrywide strikes. In the absence of any clear advantage to the public interest in the agreement, the public should not be forced to assume such risks.

On the other hand, we do not believe that the carriers should be precluded from all efforts to improve their position to withstand a strike. Thus, we think that the inducement to violation of the Railway Labor Act is reduced substantially when the obligation to pay funds to a struck carrier is related to "windfall" receipts of a competitor. This conclusion would be further strengthened if the plan were so conditioned as to assure that the payments to the struck carrier would not exceed the difference between the actual operating expenses incurred during a strike and any earned revenues. At the same time, where strikes do occur, the limited payments would avert possible financial disaster to a carrier and attendant violence to the scheme of national air transportation. We, therefore, urge that such a limitation be imposed as a condition to approval of the Pact. In this connection, another condition should require a struck carrier, for all periods of partial or complete shutdown, to report promptly to the Board its actual revenues earned and actual expenses incurred, by CAB functional accounts.

Because of the difficulties which might result from distortion of principles under which payments are computed, the Bureau believes it essential that payments be determined according to a fair, precise, and uniform method. This can be accomplished by requiring the Pact members to arrive at uniformity in the formulas for computing net added revenues which each has thus far individually determined, by setting up continued adherence to periodic reporting requirements as a condition precedent to receipt of payments under the Pact, and by requiring more detailed reporting by struck carriers. The record at hearing shows that notwithstanding individually differing fiscal treatments among the carriers, there is no reason why a uniform method for determining added net revenues cannot be devised.

Conditional approval for 3 years is urged because on the basis of the record as it exists, a trial period, at the end of which the Board may review the Pact, is necessary.

As noted above, the Bureau proposes that its position be adopted prospectively, so that carriers will not be required to repay sums already due

[14] If the objectionable tendencies toward prestrike consultation and forced industrywide bargaining positions did not come to fruition during the current Eastern Air Lines strike, this does not prove that the Bureau's concern is misplaced. The initiating cause of that dispute was the crew complement issue, as to which the attitude of all Pact members has evolved to a substantially identical position. Accordingly, specific consultations would not have been necessary since it is obvious that all of the members were in substantial agreement with Eastern's original stand on that issue.

which would not be payable were our position adopted. The principal effect of this recommendation is to allow Eastern to keep approximately $10 million in supplemental payments which it has received as a result of the 1962 FEIA strike. This recommendation is based on the wording of the Pact itself as it reflects the carriers' intent, the fact that return of this money might unjustly enrich Pact members other than Eastern, special circumstances attending the Eastern strike, and the financial impact on Eastern of being forced to return this large sum.

UNION PARTIES' POSITION AND ARGUMENT

The union parties take the position that the concept of mutual assistance among the air carriers in the air transportation industry is adverse to the public interest standards of section 102 of the Act and, therefore, the mutual aid agreement should be disapproved in its entirety. They have denounced any prior contention that the Pact violated the Railway Labor Act, the antitrust laws, or the Act. Their objection to the Pact is confined to the direct assertion that the Pact does not serve the public interest, hindering the attainment of the objectives set forth in section 102 of the Act by (1) aggravating labor disputes, and rather than contributing to the "stability and efficiency in air transportation that freedom from industrial strife will provide," has caused a deterioration of labor-management relations in the air transportation industry; and (2) defeating the major purposes of the Railway Labor Act.

It is asserted generally that the Pact has been "detrimental to good labor relations" in the industry, creating a spirit of hostility, mistrust, and a hardening of attitudes, and having "a tendency to destroy the effectiveness of collective bargaining" which is dependent upon an atmosphere of good labor-management relations. Instead of operating as a defense of the carriers against mutual assistance among unions, it has produced an opposite effect, resulting in an atmosphere of mutual combat which has culminated in a substantial increase in the number of strikes, both legal and illegal, accompanied by an increase in duration and severity.

While not contending that the Pact violates the Railway Labor Act by contravening specific commands or prohibition thereof, it is urged as not in the public interest because contrary to the spirit and stated purposes of the Railway Labor Act. It defeats two of its major objectives, that of avoiding interruptions to commerce or to the operation of an air carrier engaged therein, and that of providing for the prompt and orderly settlement of disputes concerning rates of pay, rules, or working conditions. It is contrary to the spirit of the Railway Labor Act in its long-term purpose which is alleged to be the forcing of joint bargaining on the unions in violation of section 2, First, of the Railway Labor Act and under the influence of the Pact, the carriers, in fact, had violated the duty imposed by the Railway Labor Act to bargain in good faith.

The union parties agree with the Bureau that the carriers, as proponents of the agreements, have the burden of showing affirmative justification in the public interest for the Pact and allege that they have failed to sustain this burden. They deny vigorously that the carriers have proved any imbalance in the bargaining position of the unions over that of the carriers, and claim no disparity in economic

power, in fact, exists. In support, they show that financial resources of air transport unions are insignificant when compared to the resources of the carrier members of the Pact, and allege that union strike benefits, interunion solidarity and mutual assistance are not significant factors in labor disputes. Strike benefits are paid by only three air transport unions (ALPA, IAM, and FEIA) and the benefits paid are not comparable to the mutual aid payments. Interunion solidarity and assistance, which the carriers characterize as a "united front" of the unions, is, in fact, almost nonexistent, while financial cooperation and interunion cooperation during strikes are practically ineffective.

The union parties insist that the Pact is not a defensive weapon but a "declaration of war" and its continuation can only result in a labor reaction to counter force with force. If the Pact is approved the unions will be forced to reactivate the AATU and to look for additional methods of union cooperation to offset its effects. This can only lead to further hardening of attitudes and an increasing deterioration of labor-management relations.

The union parties recognize that there must be an improvement in these relations and express the conviction that it does not lie in the arms race concept of the Pact. They suggest that a sound program involving mutual cooperation between labor and management would be a more rational solution of the problem than mutual aid agreements and that the Board could render assistance in this regard. As a partial solution, they recommend conferences between labor and industry, held under the auspices of the Board, for the discussion of mutual problems during periods when labor negotiations are not pending.

Although the unions admit that the existence of the Pact does not prevent labor-management conferences, the atmosphere of mutual mistrust which it engenders makes the chances of success for this new approach to the labor management problem almost unattainable. This mistrust also prevents the accomplishment of the public interest objective of section 102 because of labor's reaction to the carriers' methods in labor-management relations. According to this view, the carriers rely upon the use of economic force accompanied by carrier attitudes which reflect time-worn, antiunion traditions. They cite the preamble of the Pact as an example of the carriers' attitude that all the "good guys" are on one side and all the "bad guys" on the other.

As their final argument that the carrier parties have not proved the Pact to be in the public interest, the unions cite the failure of the carriers to show that the Pact has saved an air carrier from financial chaos during a strike, or that the mutual aid payments have effected the difference between survival or collapse of a struck carrier. Without contributing to a decrease in labor strife, the potential liability under the Pact threatens to bankrupt the industry, clearly not fostering sound economic conditions in air transportation.

In the event the Pact is not disapproved, the unions urge that approval be limited to payments to struck carriers for strikes in which the union members also receive strike benefits and that payments be equated to those benefits. They also recommend that payments

be prohibited in the case of a strike which arises out of a dispute in which the carrier claiming the payments has refused to accept the recommendations of any duly designated fact-finding tribunal appointed by the Federal Government, and that as a further condition to approval the carrier parties agree not to seek to deduct the amount of the mutual assistance payments from corporate income tax returns.

The reply brief of the union parties takes issue with the Bureau's position of a distinction between a Pact based upon "windfall" payments and one based upon an "insurance" principle. They deny any distinction, in kind, exists and that the Board is barred legally from approving the Pact upon the basis of a belief as to what is or is not a reasonable defensive weapon in the collective bargaining process. In support, they cite the prior holding of the Board for the proposition that the public interest is concerned only with the likelihood of a particular weapon bettering or worsening labor-management relations. If it worsens such relations, its use is adverse to the public interest whether it is a reasonable or unreasonable weapon.

CARRIERS' POSITION AND ARGUMENT

Although maintaining that before the Board can disapprove the Pact under section 412(b) of the Act, it must affirmatively find that the agreement is adverse to the public interest or violates the Act, the carrier parties seek to prove that the Pact furthers the public interest objectives and is not in violation of the Act. They rely in part upon the Board's prior decision, stating: "The Board's original conclusions are of crucial significance to the issues in this proceeding. In the absence of any evidence detracting from those conclusions they are controlling." [82]

The carriers assert that the Pact is entirely consistent with the objectives of section 102(b) of the Act, wherein the Board is directed to consider as being in the public interest "the regulation of air transportation in such manner as [to] foster sound economic conditions in such transportation * * *" and does not prevent the carriers from complying with their obligations under the Railway Labor Act.

They argue that an imbalance in bargaining power in favor of the unions exists which the Pact is designed to lessen. Because of the peculiar vulnerability of air carriers to financial losses due to strikes, an individual carrier is helpless to defend itself against the unions' economic power. This has enabled the unions to misuse their right to strike and to ignore genuine collective bargaining, often making and obtaining unreasonable and unwarranted contract terms. The carriers deny any intention to conduct an "antiunion crusade" and view the Pact as a legitimate exercise of managerial discretion providing a multiparty defense against unreasonable use of union economic pressure. Its primary purpose is to afford "a measure of financial protection" to a carrier which is threatened with either the ruinous financial consequences of a strike or capitulation to unreasonable union demands.

The carriers make the allegation that the unions have repeatedly misused their strike power against the carriers, often illegally, and

[82] The examiner has ruled to the contrary, note 26 *supra*.

that the misuse of the strike power cannot be offset by judicial means due to an inadequacy of legal remedies affording relief to carriers in air transportation. Against the illegal use of the strike power, as well as against a legitimate strike, an individual carrier is helpless since air transportation is a time-sensitive commodity, and its use cannot generally be accelerated or postponed. It can neither be stockpiled as in other industries nor can lost traffic of a carrier be retrieved after the strike is ended. Besides a loss of all operating revenue during the strike, an air carrier continues to incur substantial expense which is fixed in the sense that it cannot be avoided or postponed. There are also long-term losses to a struck carrier for it loses its market identity for the period of the strike and finds upon resumption of service that its share of the travel market has been curtailed.

The carriers claim that mutual aid payments have not been sufficient to enable a carrier to recover the full amount of the losses experienced as a result of a strike. Even with supplemental payments, Eastern, during its recent strike by FEIA, sustained losses of more than $9 million after the payment of all mutual aid benefits in less than 3 months. Notwithstanding its inadequacy in this respect, the carriers assure that the Pact has been of importance in preserving a measure of financial integrity for carriers shut down by strikes since mutual aid assistance of some $31 million has been afforded carrier parties, partially offsetting strike losses in excess of $74 million.

The carrier briefs comprehensively review the Railway Labor Act, its purposes, procedures, and judicial interpretation. They point out that although the Railway Labor Act establishes extensive procedures for resolving "major" labor disputes involving rates of pay, rules, and working conditions, these procedures cannot compel a settlement of a dispute which remains in the hands of the parties to work out through the process of collective bargaining backed up by their economic weapons. While the carriers have felt an obligation to settle labor disputes in accordance with the recommendations of Presidential Emergency Boards appointed pursuant to section 10 of the statute, the unions have consistently regarded them as bases upon which to negotiate additional concessions, not uncommonly avoiding any serious effort to settle a dispute until the procedures of the Railway Labor Act have been exhausted.

The carriers contend that the unions also augment their economic power by extensive mutual assistance activities. Over half of the employees of the parties to the Pact are members of the unions, the majority of which are national, with chapters or affiliated organizations representing the employees of several carriers. These unions have strike benefits which are payable to their members during a strike out of funds contributed by affiliated nonstriking chapters, thus bringing the full power of the national union against the struck carrier. In addition, there have been significant instances of inter-union financial aid and cooperation which have not been limited to air transport unions. This activity has included loans, concerted refusals to work in support of a strike, and refusals to cross picket lines.

The carriers counter the unions' contention of worsened labor relations due to the Pact by showing that in spite of the dire predictions

of the unions, the carriers and the IAM have been able to reach agreements on new contracts during each of the past 3 years with a minimum of difficulty and without resort to the extraordinary procedures of the Railway Labor Act. They also deny that the Pact has destroyed the effectiveness of collective bargaining, promoting instead the peaceful settlement of labor disputes by minimizing the imbalance of bargaining power. Since the air carriers are more capable of withstanding strikes, the unions are deterred from engaging in work stoppages to secure their demands, which results in more reasonable settlements. The proof of this is claimed by the fact that in only one instance since the Pact has there been a work stoppage due to a strike against a Pact member not arising out of the pilot-flight engineer jurisdictional dispute. It is also pointed out that contrary to prediction, there has not been an industrywide strike in retaliation to the Pact, and the unions have shown no tendency to abandon their traditional "whipsaw" bargaining technique.

Finally, the carriers argue that the Pact, even with the supplemental payments provision, provides only minimal financial protection to a carrier insufficient to encourage it to take a strike if there is any possibility of a reasonable settlement of a labor dispute. In fact, the effects of a strike upon a carrier are so great financially, competitively and operationally, causing immeasurable damage to employee morale, customer and community relations, and operating efficiency, that regardless of mutual aid a carrier would not take or prolong a strike if any reasonable alternative were available.

In reply to the Bureau's recommendation that the supplemental payments provision of the agreement be disapproved because such payments may lead to increased consultation and uniformity of bargaining positions among the carriers, the carriers characterize the Bureau's position as pure speculation, contrary to the rationale underlying the national labor policy, and a substitution of the judgment of the Bureau for that of the Congress. They cite the decision of the U.S. Supreme Court in *Labor Board* v. *Insurance Agents*, 361 U.S. 477 (1960), as authority for the proposition that the national policy, as reflected by the labor statutes, is based upon the abstention of Government from any regulation of the economic weapons employed in labor disputes.[83]

The carriers disparage the argument of the Bureau that increased consultation among the carriers and alinement of bargaining positions, induced by supplemental payments will "force the carriers into a posture of multiemployer bargaining in substance * * *, without union acquiescence" as not logically sound. It is shown that under the policy of the National Mediation Board, collective bargaining either on an individual or industrywide basis is equally acceptable, but that industrywide bargaining without the consent of the other party will not be imposed by the National Mediation Board. The Board in its decision in *Airlines Negotiating Conference*, *supra*, has

[83] They also cite: *Airlines Negotiating Conference*, 8 C.A.B. 354 (1947); *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711 (1945); *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87 (1957); *Pan American World Air.* v. *Flight Eng. Intern. Assoc.*, 306 F. 2d 840 (2d Cir. 1962); and *Kennedy* v. *Long Island Railroad Company*, 211 F. Supp. 478 (S.D.N.Y. 1962). Reference is made to the applicability of sec. 20, Clayton Act, 29 U.S.C. 52, and sec. 4 of the Norris-La Guardia Act, 29 U.S.C. 104, as construed by *United States* v. *Hutcheson*, 312 U.S. 219 (1941).

recognized that it was not against public interest for carriers to conduct negotiations through common bargaining agents, and that the Railway Labor Act contains no prohibitions against consultation among carriers. Similarly, it found that mere consultation or use of a common bargaining agent is not multiparty or group bargaining.

The carriers contend that the argument that the amended Pact may lead to heightened labor disputes is fatally defective in the failure to take into account the overriding public policy—Government abstention from the regulation of the economic weapons employed by the parties in labor disputes. The substitution of the judgment of the Board for that of Congress in the field of labor relations is not permitted because of "lack of expert competence" and the Board must be particularly careful not to "contravene the national policy as to * * * labor relations." (*Burlington Truck Lines* v. *U.S.*, 371 U.S. 156, 173 (1962).)

In answer to the Bureau's contention that the Pact would lead to the formation of union retaliatory bargaining programs, in support of which the Bureau cites the efforts of the IAM to develop common contract termination dates to achieve joint bargaining, the carriers point out that the IAM has expressed a preference for joint bargaining in the air transport industry. As far back as 1953, the IAM succeeded in obtaining concurrent mediation of a dispute with six air carriers, and in the following year threatened to strike to force the same carriers to agree to joint negotiation procedures. In 1957, the IAM again expressed an interest in joint bargaining, although it did not eventuate. Therefore, it is argued, the resolution adopted at the IAM convention in 1960 was simply a formalization of a policy which the union had been following for years.

In conclusion, the carriers deny that any modification of the agreement is required in the public interest; those suggested by the Bureau would impair the effectiveness of the Pact, and those requested by the union parties are unrelated to the resolution of industrial disputes and would be unfair to the carriers.

With reference to the Bureau's recommendations, the carriers submit—

1. Restriction of mutual assistance payments to net operating expenses incurred during a strike, disregarding all other losses, would be contrary to sound business practices and also to the public interest since it would not "foster sound economic conditions" in the industry.

2. Reporting provisions are not objected to by the carriers, but should not delay payments during a critical strike period, as would result from the Bureau's recommendation that filings of reports be made a condition precedent to payment.

3. A uniform method of computing "windfall" is recognized by the carriers to be desirable and the carriers have been attempting to accomplish this objective—however, no time limitation should impose this requirement unreasonably.

4. A limitation of the agreement to a period of 3 years is not required or reasonable since the agreement is subject to the continuing jurisdiction and power of the Board to disapprove an agreement at any time. No further trial period is required, the agreement

having been in effect for more than 3 years and having been subject to exhaustive examination and analysis in this proceeding. The principle of mutual aid has attained a degree of permanency in the industry, and the uncertainty which limited approval would create may seriously affect the credit standing of the carriers.

5. Prospective disapproval of the supplemental payments provision involves an interpretation of the agreement which is controversial among the carrier parties and is inconsistent both with the position of the Bureau that supplemental payments may constitute a corporate waste of assets, and with the Bureau's finding that the supplemental payments are not in the public interest.

DEVELOPMENT OF MUTUAL ASSISTANCE AGREEMENTS

According to the original version given by the carrier parties of the "birth of the Pact" [84] which, incidently, they now concede did not disclose the entire picture of the negotiations preceding the execution of the Pact, the agreement was a hastily contrived arrangement "conceived, drafted and negotiated in a five-day period, October 27 to October 31, [1958]" [85] to provide financial assistance to Capital. On October 17, 1958, Capital was struck by IAM in a labor dispute among seven carriers (Capital, Eastern, National, Northwest, TWA, and United) and the IAM over contracts relating to wages, rules, and working conditions of mechanics and other employees of these carriers. Negotiations had begun in 1957, and after failure of mediation by the National Mediation Board, a Presidential Emergency Board (No. 122) was appointed on February 2, 1958, to concurrently hear the controversies.[86]

Joint hearings relating to the six carriers were held by the Emergency Board, which issued individual recommendations of settlement for each carrier in a report dated September 17, 1958. These recommendations were accepted by the individual carriers but refused by the IAM. At the expiration of the 30-day waiting period provided in the Railway Labor Act, Capital was struck on October 17. The strike continued for 37 days and was terminated upon the execution of a contract which provided terms more favorable to the union than those recommended by the Emergency Board. Subsequently, on November 21 and 24, 1958, in the same dispute, IAM struck TWA and Eastern, the Eastern strike coinciding with a strike called by FEIA. The other carriers negotiated contracts with the IAM without work stoppages.

Capital, acting through the medium of the ATA, appealed to the larger carriers competitive to it for financial assistance. American and United, although free of labor difficulties at the time, immediately agreed to furnish whatever financial assistance was necessary and shortly thereafter Eastern, Pan American, and TWA indicated a willingness to enter into an assistance arrangement which would benefit Capital.[87] George Spater, then counsel for TWA and pres-

[84] Union Br., p. 28.
[85] Carriers' joint exhibit 1.
[86] Prior to the opening of hearings before the Emergency Board, United settled its differences with the IAM and a contract was negotiated.
[87] American's mechanical employees were represented by TWU and United had settled with IAM. Pan American has no employees represented by IAM.

ently counsel for American, was the drafter of the original mutual assistance agreement and testified that he had been working on an agreement of this character for some time. As counsel for TWA, he had been seeking a method to cope with the labor problems which were facing the major air carriers due to the imminent delivery of jet equipment and, among other things, joint bargaining and mutual assistance were being actively considered.[88] When the question of devising a quick means to assist Capital was presented to him by TWA's president on October 26, 1958, he used a draft of a mutual aid agreement which he had prepared and amended it to include Capital as a party.

Although the actual document representing the Pact may have been drafted within a 5-day period in October of 1958, triggered by the strike and financial problems of Capital, the record is clear that the mutual aid principle had been under consideration by the major air carriers for at least a year prior to the execution of the original Pact. It is also quite clear that the expressed purposes of the Pact—to induce the unions to accept the recommendations of Presidential Emergency Boards and to protect carriers against illegal strikes—were not the only objectives of the carriers in executing the agreement.[89] The Pact appears as a preliminary step toward the accomplishment of a labor relations policy which had been evolving in the industry for a considerable period of time.

As far back as 1947, a group of 18 certificated air carriers entered into an association, the Airline Negotiating Conference, which was to function as the collective bargaining representative of the carriers. The Articles of Association for this Conference were filed with the Board pursuant to section 412(a) and approved.[90] In approving the agreement, the Board recognized that the conference would probably result in increased consultation among the carriers and also would have a tendency toward the settlement of labor-management problems on an industrywide basis. However, it found no compulsion was involved and that under the agreement each carrier was free to settle its labor problems independently. This organization ceased to exist in 1950[91] and was succeeded by the Airline Personnel Rela-

[88] "Well, it was almost an entirely different train of events and that is that certain carriers were about to receive jet aircraft and were having difficulty or facing difficulty, potential difficulty with pilots and flight engineers in the manning of those aircraft and I had been engrossed in this problem for a long time and on a weekend, between the time I talked to Mr. Hankins and the time I got Mr. Hankins' letter, I began working on an agreement which was expanded into the Mutual Aid Pact.

"As it was originally drafted, Capital was not a party. I drafted the agreement. I did it, having in mind the particular problem that TWA, Pan American and American in particular were facing at the time and other carriers to a lesser degree concerning the delivery of jet aircraft."

[89] The preamble of the original agreement (which remains unaffected by the amendments) states, in part, that "[The union had] shown utter disregard for the recommendations of the Emergency Board (122) appointed by the President of the United States to investigate said dispute and has struck Capital Airlines and threatened to strike other carriers for their insistence upon substantial compliance with the terms of said recommendations, which action of the IAM tends to undermine the influence, position and integrity of such Board and is destructive of the collective bargaining process; and

"WHEREAS, it is in the public interest and the interest of the parties hereto that the recommendations of such Presidential Emergency Board created under the provisions of the Railway Labor Act be respected by the employers and employees whose dispute was heard by the Board; * * *."

[90] 8 C.A.B. 354 (1947).

[91] Although not entirely clear in the record, this organization apparently died from mere desuetude.

tions Conference,[92] an informal association of personnel representatives of the carriers. This organization, in turn, was superseded on January 1, 1957, by the Personnel Relations Conference (PRC) a conference of the Air Transport Association through which personnel information is disseminated to the industry and under whose auspices periodic conferences of personnel relations officers take place.[93]

In May 1957, the PRC adopted a resolution establishing a special committee to consider the advantages of "joint airline labor negotiations"; and on July 31, 1957, a report prepared by this committee on the "Industry's Need to Achieve Bargaining Equality" was adopted by the conference.[94]

Guy Farmer was retained as special counsel by the ATA in August 1957 to prepare various documents relating to group bargaining arrangements among the carriers. He submitted a completed plan for mutual aid in January 1958, titled "Outline of Mutual Aid Fund"[95] in which it was concluded that financial assistance to struck carriers would be essential for the successful operation of group bargaining. The program provided for an association of air carriers, with indemnity payments to be paid a struck member only "if the board of directors has determined prior to the strike that the dispute was a matter for joint action" with payments excluded "if the bargaining position has been disapproved by the association." The indemnity payments were limited to 12 percent of the normal operating costs of the carrier and were payable only if the strike resulted in a complete shutdown of operations. Another Bureau exhibit[96] indicates that on August 22, 1958, there was consideration of a mutual insurance program for Pan American, TWA, American, and Eastern, which was to be followed by a "broad group bargaining plan" which contemplated the formation of a Nebraska insurance company to underwrite the plan.

While the record is far from complete as to the negotiations of the carriers either prior or subsequent to the extension of the Pact, it is evident that one of the motivating factors was a dissatisfaction with the operation of the Railway Labor Act in the air transporta-

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[92] The composition of this group is also vague. However, Joseph O'Brien was the executive director of this conference and became a vice president of the ATA when this conference became officially associated with the ATA.

[93] The bylaws of this conference were submitted to the Board on May 24, 1962, after the Board in an apparent reversal of a prior ruling, found the conference bylaws of the ATA were required to be filed under sec. 412. ATA's transmittal letter reserved its contention that conference bylaws of ATA are not subject to Board jurisdiction.

[94] BER-6. This report is not in evidence.

[95] BER-19.—It is stipulated that this document is only one of a number submitted by Mr. Farmer.

[96] BER-1.—Memo to president of ATA from its general counsel, apparently stemming from Pan American's controversy with ALPA over the crew complement on jet equipment, in which counsel gave his legal opinion on prior inquiries. Two of the inquiries follow:

"(1) Whether there is any way in which, if the Mediation Board releases the dispute and there is a strike on Pan American, to force a strike on all three carriers now in negotiation: viz. PAA, TWA, and AA.

"That is, whether, if PAA were the first to be struck, it could lease its equipment to the other two carriers, the pilots would refuse to fly the equipment and the two carriers then be free either to:

"(a) Discharge the pilots or

"(b) Shut down their operations by reason of pilot's breach of the working agreement (on the theory of a 'partial strike').

"(2) If the answer to the foregoing question is negative, whether it is feasible for the three carriers, plus perhaps Eastern, to enter into a mutual insurance plan now."

tion industry.[97] The carriers under the leadership of the ATA apparently extensively explored ways and means to rectify the deficiencies which the air carriers believed made it unsuitable to the air transportation industry regardless of its effectiveness in the railroad industry. And, it is quite evident insofar as the air carriers as a whole are concerned, there is an expressed preference for Taft-Hartley over the Railway Labor Act.

Even during the period the Board was considering the approval of the original Mutual Aid Pact, the carriers were actively seeking to either amend the Railway Labor Act or strengthen the Mutual Aid Pact by incorporating group bargaining with the insurance principle. In an amended, unsigned memorandum out of the files of the ATA, unidentified except as a memorandum prepared during February 1959, but believed to be the recommendations of a special committee of the ATA (Patterson Committee) which was working on this problem at the time, it was recommended that the Railway Labor Act be amended to provide: time limitations on negotiation and mediation; a provision for secret ballots of employees on the acceptance of an employer's last offer, as well as on strike votes; a substitution of the emergency provisions of the Taft-Hartley Act for the Presidential Emergency Boards under the Railway Labor Act; various changes in representation procedures, including employer participation and "no union" option ballots; and prohibitions against secondary boycotts and jurisdictional strikes. However, the memorandum concludes with the consensus of the committee that amendments to the Railway Labor Act would not be feasible at that time and therefore the solution of the carriers' labor problems was in the development of the principle of group bargaining, implemented by some form of mutual financial assistance.[98]

The original Pact was approved on May 20, 1959, and on June 19, 1959, the amendment (CAB 12633-A) conforming the agreement to the Board's conditional approval, was filed. Evidence in the record indicates that at a meeting of PRC, held on June 30 and July 1, 1959, a "new mutual aid-bargaining plan" had been proposed.[99] On July 22, 1959, at a meeting of personnel officers of the carriers, "methods of expanding the agreement to make it more attractive to other trunk carriers" were discussed, and, subsequently, at a meeting of

[97] The report of the Task Force on National Aviation Goals (Project Horizon) issued in September 1961, recognized a deterioration in labor-management relations in the air transportation industry which was attributed to the ineffectiveness of the Railway Labor Act and new legislation was recommended. It is stated: "We are not convinced that the Railway Labor Act has lost its entire utility. However, it certainly has lost much of its desired effectiveness, in view of the record of work stoppages experienced by the industry since 1947. Conceivably, a basic weakness of the act is that it does not provide a sufficiently varied arsenal of techniques for the peaceful settlement of disputes." See also: *Symposium—Connecticut General Life Insurance Company*, Nov. 2, 1961.

[98] BER-2, p. 1.—"One conclusion on which there is unanimous agreement is that while the Railway Labor Act and existing procedures thereunder are in many areas inadequate and can be improved, the labor problem which exists in this industry cannot, as a practical matter, be solved by any amendments to the Railway Labor Act which would be feasible. The basic problem in this industry is a lack of unity among the carriers in dealing with labor problems and the economic imbalance which exists between individual carriers and the major airline unions, principally the Pilots and Machinists.

"It is the unanimous conclusion that this problem can only be resolved through development of the principle of group bargaining (through designation of a common bargaining agent) implemented by some form of mutual aid. The present six airline agreement is a step in this direction but as now restricted in its operation, is inadequate in terms of the overall industry problem. The development of group bargaining and mutual aid should continue to be our primary objective."

[99] PRR-3.

counsel for the carrier parties, a draft was prepared which was circulated among the parties. As described in an exhibit of the carrier parties, it proposed to amend,

> • • • the strike coverage provision by adding as an event giving rise to payments a strike to enforce demands opposed to a position recommended by unanimous agreement of the chief executives of the parties. The payment provision was altered to guarantee minimum benefits equal to 15 percent of a struck carrier's estimated normal operating expenses.[1]

Discussions relating to plans for amending the Pact to incorporate insurance and joint-bargaining plans were held under the auspices of the ATA during the latter part of 1959 and early 1960. Despite extensive negotiations, no agreement of the carrier parties was reached. As an interim agreement, the March 7, 1960, amendment was proposed, retaining the "windfall" principle as the basic philosophy of the Pact.

The March 7, 1960, amendment which in practical effect extended the coverage of the Pact to all lawful strikes[2] and made the Pact more attractive to smaller carriers, was a logical interim step consistent with the pursuit by management of an effective deterrent to the unions' use of their strike power. Once management made the decision to combine the carriers' economic power in opposition to the unions' strike power as a permanent policy in labor-management relations, the extension and fortification of the carriers' economic power would naturally be a continuing objective of management.[3]

According to the carrier parties, this amendment was necessary to induce the smaller carriers to join the Pact so as to increase the effectiveness thereof. The previous restriction of coverage in the original Pact to lawful strikes only after Emergency Board recommendations, acted to prevent the smaller carriers from benefiting from the Pact because of the unlikelihood of such boards being appointed in labor disputes affecting their relatively limited operations. Obviously, joining the Pact under these conditions would impose obligations upon these carriers to their larger competitors without reciprocal benefits.[4]

The March 7, 1960, amendment was adopted in principle at a meeting of the carrier parties on January 22, 1960. At this same meeting, attended by the principal executives of the then six Pact members and of the ATA, it was the consensus of those present that the Pact should be enlarged to embody the insurance principle and the president of ATA was requested to investigate its feasibility.

On April 11, 1960, 1 week after Continental had joined the Pact, the president of ATA submitted a memorandum to the original six carrier members outlining an "insurance" program. Commercial insurance was not recommended, as too costly, and an intercarrier self-insurance program providing for a guaranteed benefit to a struck carrier of 25 percent of normal operating expenses, was recommended. Drafts of several agreements incorporating this proposal

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[1] Carriers' joint exhibit 1.

[2] This purpose was not completely accomplished, requiring an additional amendment in the "supplemental payments agreement." See p. 600, *supra*.

[3] Similarly, the amendment filed Oct. 24, 1960 (CAB 12653-A7), extending, in effect, the duration of the Pact indefinitely, also represents a logical progression.

[4] As indicated elsewhere, Northwest, National, Continental, and Braniff joined the Pact in March and April 1960.

were prepared and circulated by the ATA to the carrier members on May 25 and October 7, 1960.[5]

The record does not indicate any particular activity in this direction until the fall of 1961. On November 14, 1961, a new draft agreement was prepared and circulated to the parties by the ATA. The draft provided for insurance payments limited to a percentage of the normal operating expenses, a carryover provision of the yearly maximum liability for a period of 1 year, and for a coordinator who would calculate the payments required under the agreement. It was considered at meetings of the Pact members held in New York on December 19 and 20, 1961. Revisions were circulated on December 27, 1961, and January 5, 1962. At a meeting in New York on January 10, the present "supplemental payments agreement" (CAB 12633–A8) was agreed upon. The members of the Pact signed the agreement at various times during January 1962 with a proviso that the execution of the agreement be held in escrow until accepted by Continental, National, and Northeast.

Carrier parties' brief sets forth three principal reasons for the adoption of the "supplemental payments agreement." First, it is claimed that mutual assistance based on the "windfall" principle in most cases did not constitute sufficient protection to the carriers against the full brunt of union economic pressure, which still suffered tremendous financial losses from strikes. Secondly, that several major competitors of Pact members were not parties to the agreement and their adherence appeared unlikely. And, finally, the lack of restraint exercised by several of the major transport unions in the use of their strike power, shown by the "irresponsible union strike action" in the bitter jurisdictional dispute between the pilots and the flight engineers' union, was expected to continue. The carriers stress the imminence of strike action as a causative, stating: "In fact, the imminence of strike action by those unions was a catalytic force that compelled the carriers to improve the protection afforded by the Mutual Aid agreement."

In support, the carriers assert:

First, in only one instance, the Capital strike in 1958, did the mutual aid payments exceed 25 percent of the estimated normal operating expenses of the carrier. In only two instances did the percentage of actual operating expenses incurred to the normal operating expense, drop below 25 percent. The total net losses from strikes of the carrier parties over the period 1958–61, after deducting "windfall" receipts, was over $33 million, and in only three instances did "windfall" payments equal as much as one-half of the total losses suffered by a struck carrier.

Second, Eastern's competitors, Delta and Northeast, had never been members of the Pact, and National had served notice of withdrawal in July 1961. Western Air Lines, a competitor of United, was not a member and had not shown any inclination to join the Pact. Pan American, TWA, and Northwest were subject to substantial competition from foreign-flag carriers.

[5] Carriers' joint exhibit No. 1.

Third, American, TWA, Eastern, and Pan American were involved in various stages of contract negotiations with both ALPA and FEIA, which involved the flight-crew complement and strike action appeared imminent.

The examiner has outlined at considerable length the history of the development of the Pact because of the obvious union resentment toward the alleged tactics of the carrier parties.[6] Whether the carriers can achieve the *unification which would be necessary to accomplish* industrywide bargaining by agreement in the future, is highly speculative and is not directly in issue in this proceeding.[7] Neither is the strategy or the tactics of the carriers in developing their program, since there has been no showing that the carriers' method of approach is either illegal or contrary to the public interest. Although there are certain implications in the record by which the good faith of the carriers might be questioned, it is also readily apparent that many good, sound business reasons could be found to support the failure to disclose a strategy or program relating to the highly emotional area of labor-management relations.

RAILWAY LABOR ACT

In its opinion approving the Pact, the Board found no violation of the Railway Labor Act, either innate or indicated by the record.[8] To assure that the approval would not affect the rights and obligations of the parties under that statute, it imposed a proviso to preclude the question. The unions, parties to this investigation, now concede that the agreement is not in violation of the Railway Labor Act. They contend, however, that the Pact is adverse to the public interest objectives of section 102 of the Act because it violates the spirit and defeats the purposes of the Railway Labor Act.

The purposes of the Railway Labor Act are stated in the preamble to section 2 thereof:

> The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join labor organizations; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretations or application of agreements covering rates of pay, rules, or working conditions.

[6] The unions have directly charged the carrier parties with a failure to exercise good faith in their dealings with the Board. They charge that the carriers have entered into a deliberate design to conceal from the Board their ultimate program, exercising a "controlled disclosure" and presenting their program in "a step by step" procedure.

[7] It is manifest that there are considerable differences of opinion between the carriers relating to the advisability of industrywide bargaining. The examiner takes official notice of the fact that in the present collective bargaining negotiations between the IAM and eight carriers, the IAM requested joint negotiation which was refused. Joint mediation was also requested but upon objection by the carriers, the National Mediation Board is conducting the mediation on a concurrent basis.

[8] Generally, that the argument would not (1) constitute an impediment to *bona fide* collective bargaining, (2) operate to interfere with the prompt settlement of disputes, (3) bring carriers not parties into a labor dispute, and (4) operate in variance to the policy of the Railway Labor Act in seeking to compel acceptance of Emergency Board recommendations.

The union parties argue that the Pact has, in practical effect, vitiated clauses (1) and (4) of the purposes enumerated above; and that under the influence of the Pact, the carriers have in practice disregarded their duty to bargain in good faith and have violated the spirit of the Railway Labor Act in pursuing their long-term objective, to force joint bargaining on the unions. These *are arguments* going to public interest considerations under section 102 of the Act and will be discussed later.

The Bureau recognizes that there is no specific prohibition in the Railway Labor Act against group or industrywide bargaining and that the National Mediation Board will not impose joint bargaining without the consent of the parties. It also concedes that the Board has found that the "windfall" Pact would not necessarily result in the imposition on the unions of compulsory group or industrywide bargaining. However, it circumscribes the Board's decision to the "windfall" principle and refuses to extend the Board's rationale to the "supplemental payments agreement." It argues that the Pact members do not have the same tendencies to engage in multiemployer bargaining under the "windfall" agreement as would follow from the increased pressures resulting from the unqualified liability for substantial payments under the supplemental payments provision. This reasoning embraces a hypothesis that the liability for supplemental payments without control thereof by management, may constitute corporate waste and therefore provides strong inducement to management to justify the expenditures of corporate monies by seeking to influence the policies and decisions of Pact members in labor disputes.[9] The Bureau does not believe that the same pressure upon management exists under the "windfall" Pact since the payments thereunder are directly related to increased revenues due to strikes, whereas under the "supplemental payments agreement," the payments are a direct charge upon earnings and constitute a substantial proportion of those earnings. The Bureau reasons that unless a carrier management exercised some measure of control over the bargaining position taken by a carrier member facing a strike, it would expose itself "to charges of inefficiency and waste of corporate assets" and that management in the exercise of "zealousness might overstep the boundary of permissible bargaining practices." As a corollary, the Bureau fears that this will force the carriers into multiparty bargaining[10] under the posture of individual negotiation. Before discussing the Bureau's position, the examiner believes a

[9] "No responsible carrier management, irrespective of the possible stimulant which the Pact might produce for carrier solidarity, could view with equanimity the committing of such funds to support the management policy of another carrier without the retention of some voice in the affair by the obligated member. Indeed, a carrier which permitted itself to be committed to this large a contingent liability without retaining some control over its commitment might lay itself open to a stockholders' suit for waste of corporate assets. A carrier management which may eventually have to account for substantial Pact expenditures out of earnings will naturally want to see that the recipient is pursuing bargaining positions consistent with its own views."

[10] "Thus, the strong pressures of paragraph (B) to force the carriers into a posture of multiemployer bargaining in substance, when viewed in the light of industry attempts to achieve an implemented group bargaining plan, form a part of industry attitudes over the last five years.

"The possibility of such an occurrence, without union acquiescence, tends to violate the RLA and cannot be sanctioned by the Board if the only justification for it is a dubious strengthening of the carriers' economies." [Footnotes omitted.]

short review of the provisions of the Railway Labor Act and its purposes would be of value.

The Railway Labor Act is essentially a code of procedure for handling labor relations in the railroad and air transportation industries. Except for the pressure of public opinion, no coercion is placed upon either the carriers or the employees to make collective bargaining agreements concerning rates of pay, rules, or working conditions.[11] The statute is founded upon a basic philosophy of free collective bargaining in good faith between the also freely chosen representatives of the interested parties. The responsibility to obtain a settlement of their differences and thereby prevent the interruption of essential transportation services rests with the parties, the Government providing only procedural assistance and mediation. Under the statute, the National Mediation Board has exclusive authority for the final resolution of disputes between employees relating to collective bargaining representatives.[12]

In major labor disputes involving rates of pay, rules, and working conditions, the statute provides for compulsory direct negotiation between the parties, followed, if necessary, by mediation under the auspices of the National Mediation Board, either upon request of either party or, in case of an emergency, upon the Board's initiative. Thereafter, in the event of the failure of mediation, a proffer of arbitration under the auspices of the Board may be made. If arbitration is refused, in certain cases wherein a dispute "threatens substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," the National Mediation Board may recommend to the President the creation of an Emergency Board to investigate and report upon the dispute. These Emergency Board recommendations are not enforceable against the parties except by the constraint which may result from public opinion. Cooling-off periods and requirements for maintaining the *status quo* until the exhaustion of its procedures are provided and are enforced by injunction in the Federal courts, notwithstanding the antilabor injunction provisions of the Norris-La Guardia Act and the Clayton Act provisions.[13] In the event a dispute cannot be settled by the parties upon the completion of these procedures, the parties are left to the unrestrained exercise of their

[11] In the railroad industry, so-called "minor" disputes which involve the interpretation of collective bargaining agreements are decided in proceedings before the National Railroad Adjustment Board created by sec. 3 of the Railway Labor Act (RLA). The Court has held that referral to this Board of "minor" disputes is mandatory and its decisions are enforceable in the Federal courts as compulsory arbitrations. *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957).

However, in the air transportation industry, to which sec. 3 is not applicable, a similar board, the National Air Transport Adjustment Board, with analogous powers, may be established at the discretion of the NMB (sec. 205). To date, the NMB has not found it advisable to establish such a board. In the interim, sec. 204 provides for the settlement of "minor" disputes by boards of adjustment, the establishment of which is a duty of the carriers and their employees. Until quite recently, there were conflicting Federal court decisions as to the enforceability in the Federal courts of decisions of these boards of adjustment. The Court, however, in a very recent decision has held that until such time as the NMB creates a national board, the parties are under a statutory duty to establish system, group, or regional boards of adjustment for deciding "minor" disputes and the decision of the board established under a sec. 204 contract is enforceable in the Federal courts. *International Ass'n of Machinists* v. *Central Air Lines, Inc.*, 295 F. 2d 209 (5th Cir. 1961), 31 L.W. 4335 (1963), reversing and remanding.

[12] *E.g.*, *Switchmen's Union* v. *Board*, 320 U.S. 297 (1943).

[13] *See, e.g.*, *Butte, Anaconda & P. Ry. Co.* v. *Brotherhood of L. F. & E.*, 268 F. 2d 54, certiorari denied, 361 U.S. 864 (1959).

economic pressure devices.[14] Good-faith bargaining is basic to this legislation and will be enforced by the courts.[15]

The National Mediation Board in its annual report for 1962 summarized its views of the Railway Labor Act, as follows:

> [T]he Railway Labor Act provides a comprehensive system for the settlement of labor disputes in the railroad and airline industries. The various principles and procedures of that system were incorporated in it only after they had proved effective and necessary by experience under previous statutes.
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> • • • • • • •
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> The statute is based on the principle that when a dispute involves the making or changing of a collective-bargaining agreement under which the parties must live and work, an agreed upon solution is more desirable than one imposed by decision. This principle preserved the freedom of contract in conformity with the freedom inherent in our system of government.
>
> The design of the act is to place on the parties to any dispute of this character the responsibility to weigh and consider the merit and practicality of their proposal and consider opposing views and offers of compromise and adjustment—and time to reflect on the consequences to their own interest and the interest of the public of any other course than a peaceful solution of their problems.
>
> Procedures in themselves do not guarantee mechanical simplicity in disposing of industrial disputes, which the Supreme Court of the United States has aptly described as "a subject highly charged with emotion." Good faith efforts of the parties and a will to solve their own problems is an essential ingredient to the maintenance of peaceful relations and uninterrupted service.
>
> As with any system or plan which seeks to retain freedom of contract and the right to resort to economic force, there have been periods of crises under the Act, but in the aggregate, the system has worked well—it has settled large numbers of disputes both at the local and national level with a minimum of disturbance to the public.[16]

Although the Railway Labor Act does not expressly provide any restrictions on the methods of collective bargaining, the National Mediation Board in 1939 ruled in a railroad labor dispute that group bargaining would not be imposed except by consent:

> However, as advantageous as is the handling of such disputes on a national or regional basis, the Board definitely ruled during the past year that it was not authorized under the act to require such handling on the part of either the carriers or their employees. This method can be effected only by the agreement or consent of the parties involved. • • •[17]

The air carriers, as early as 1946, requested ALPA to bargain upon an industrywide basis. ALPA refused joint negotiation and the dispute eventually resulted in the creation of Presidential Emergency Board No. 36, which heard disputes between 13 air carriers and ALPA on a concurrent basis.[18] In its report dated July 8, 1946, the Emergency Board expressed the view that "industrywide bargaining is best established and developed by mutual agreements of the parties." In May 1954, IAM made the first request by a union in the aviation industry for joint negotiation by serving a notice on six carriers, requesting them to authorize a carriers' conference committee. The carriers refused and the IAM threatened to strike upon

[14] *E.g., Brotherhood of Loc. Eng.* v. *Baltimore & Ohio R. Co.*, 83 S. Ct. 691 (1963).
[15] *E.g., Virginian Ry.* v. *Federation*, 300 U.S. 515 (1937).
[16] 28 NMB Annual Report 8-9 (1962).
[17] 6 NMB Annual Report 5 (1940).
[18] For a detailed description of TWA/ALPA negotiations, see examiner's initial decision, Reopened Transatlantic Mail Rate Case, docket 1706, Mar. 21, 1963.

this issue. Although joint handling did not in fact result, concurrent mediations under the auspices of the National Mediation Board were held with five carriers.

Although industrywide bargaining between three conferences of the railroad carriers with two groups of labor organizations has been the policy in the railroad industry for many years, and "pattern" bargaining is the normal procedure, this method of collective bargaining has not been adopted in the airline industry. The National Mediation Board has recommended the utilization of this method of resolving labor disputes in the aviation industry.[19] Emergency Board No. 122 appointed in the IAM labor dispute in 1958, also recommended this approach, as have a number of other emergency boards since that time. Except for the IAM, the air transport unions have shown no inclination for this method of bargaining. Similarly, except for the request for joint handling of the dispute with ALPA in 1946, the carriers as a group have not pressed for this method of collective bargaining.

Mere consultation between the carriers does not constitute joint bargaining under the Railway Labor Act. The Board so interpreted the Railway Labor Act in *Airlines Negotiating Conference*,[20] as well as in its prior opinion approving the Pact. The Board indicated in these opinions that unless there is compulsion, joint representation or consultation among the carriers would not violate the obligation to bargain in good faith under the Railway Labor Act. In this investigation, the Bureau has sought to find a compulsive force in the operation of the supplemental payments provision of the Pact. While conceding that there is no evidence[21] that prestrike consultations or forced bargaining positions had occurred under either the "windfall" agreement or the "supplemental payments agreement" and no evidence to indicate that such is contemplated in the future, the Bureau concludes that the economic pressure of the substantial liability resulting from the supplemental payments provision, will result (unless a carrier cedes its corporate sovereignty) in a "possibility" of or a "tendency" to consultation among the carriers or an alinement of bargaining positions which "may lead" to violations of the Railway Labor Act.

The Bureau's rationalization that a payment under the supplemental payments provision without a reservation of control over the bargaining position of the recipient carrier would constitute corporate waste, is without any stated foundation. The applicability of this doctrine appears to be dubious but, in any event, this *ipse dixit* conclusion is not the basis for the Bureau's judgment that the "supplemental payments agreement" may lead to violations of the Rail-

[19] See e.g., 27 NMB Annual Report 10 (1961).

[20] 8 C.A.B. 354, 357 (1947). "In enacting the Railway Labor Act and in requiring certificated air carriers to comply with Title II of that act Congress has spoken as to the standards of public policy, or public interest, that should apply in the settling of labor disputes between air carriers and their employees. We cannot substitute our opinions for the considered judgment of the Congress and since no specific basis upon which labor negotiations must be carried on has been established but this is left to the agreement of the parties involved, we cannot find the agreements now before us to be adverse to the public interest upon any consideration of whether or not the bargaining in which the conference may participate is on a single-carrier, multicarrier, or industry-wide basis."

[21] As a matter of fact, the record shows no increased consultations among the members of the Pact over and above the consultations which occur among carriers in the industry held under the aegis of the PRC of the ATA.

way Labor Act. It is evident that the Bureau mistrusts the carriers' motivation in entering into this agreement and the capability and willingness of management to resist the economic pressures which the liability for supplemental payments may exert. It links the supplemental payments provision with a long-term program for joint bargaining and visualizes the carriers' indirect accomplishment of their ultimate objective by design or by succumbing to the economic pressures put upon management by the agreement. This almost inordinate fear is reflected throughout its brief and is exemplified by its premise that the "windfall" payments, keyed as they are to revenues realized from the strike, "do not suffer from this vice" and by its conclusion that "the supplemental payments provision presents too great a danger of implementation in a fashion repugnant to the public interest."

This belief of the Bureau is admittedly unsupported by concrete evidence, and, even if accepted, *arguendo*, a danger based upon a mere tendency or possibility of implementation in violation of the Railway Labor Act is not *ipso jure* a violation of that statute, and would also appear to be an insufficient ground upon which to sustain a finding that an agreement entered into openly by a group of carriers for valid business purposes was adverse to the public interest. A finding by a Government agency, based upon a mere surmise, possibility, or suspicion that a carrier or group of carriers will act in disregard of their statutory obligations would imply an inference not only unnecessary for the protection of the public interest but at variance with a basic tenet of our philosophy of Government.[22] Moreover, the provisions of the Railway Labor Act are enforceable in the courts as well as by the Board. Also, the unions concerned are not defenseless and may be depended upon to bring any violation either of the Railway Labor Act or the Act to the attention of the Board which has plenary authority to prevent or redress violations of the Act, or to disapprove the agreement, if required in the public interest.

The examiner has scrutinized the Pact with relation to the Railway Labor Act and is unable to find it inconsistent with the provisions thereof or contrary to the purposes or principles expressed therein.[23] The agreement on its face requires a carrier member to do nothing contrary to the policy or principles of the Railway Labor Act and is obviously intended as a financial device to strengthen the bargaining position of a carrier vis-a-vis a union's intercarrier organization. It is an overt pooling, limited in amount, of the financial resources of the carrier members, accomplished expressly for the purpose of minimizing the union strike power. The vehemence of the objections raised both by the unions and the Bureau attests to the fact that the agreement has been, and would be, an important factor in the collective bargaining process. However, by its terms, it is a financial

[22] See, *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 477 (1950).

[23] Nor is there any substantial evidence in the record that any violations of the Railway Labor Act have occurred in the workings of the Pact. The evidence in this regard is limited to one expression of opinion of a labor witness relating to the negotiations during the IAM controversy in 1958 which he believed were not conducted by the carriers in good faith.

weapon solely, without any patent antilabor provisions and is based, in part, upon mutual insurance principles.

No argument has been advanced that strike insurance is invalid *per se* under the Railway Labor Act nor do the court cases sustain an interpretation of the Railway Labor Act which would interdict strike insurance arrangements as a method of economic self-help. It is a basic premise of the Railway Labor Act that once the procedures provided therein have been exhausted and the *status quo* period has terminated, the parties may employ any means or methods of economic force available in order to obtain bargaining agreements acceptable to them.[24] If the purpose of an economic weapon is to obtain a collective bargaining agreement and its use is not motivated by antiunion animus, union discrimination, or designed to coerce or interfere with the selection of the collective bargaining representative of the employees, an employer may use any weapon which it can devise. Correlatively, a union may use any economic weapon which its ingenuity may invent, not inconsistent with good-faith bargaining.

The policy of Congress, as reflected in national legislation regulating labor-management relations,[25] is to impose duties upon labor and management to engage in collective bargaining in good faith, the Government abstaining from regulating the economic weapons used or from interfering with the substantive provisions of the collective bargaining agreement arrived at by the parties as a result of this process.[26] This national policy fully recognizes that the collective bargaining process is essentially antagonistic and contemplates the use of economic weapons held in reserve if the parties are unable to resolve their differences by negotiation in good faith. The Supreme Court in cases decided under both the Railway Labor Act [27] and the National Labor Relations Act, as amended,[28] has acknowledged the paradoxical concept of the national policy which contemplates good-faith bargaining between the parties and the compulsion of economic pressure devices existing side by side.

Under the National Labor Relations Act (Taft-Hartley) the use of economic weapons is not limited to protected activities nor has the Court indicated an inequality between labor and management. For instance, a lockout to counteract a "whipsaw" strike against one of a group of employers has been approved as legitimate self-help,[29] and in the Insurance Agents case, note 28, *supra*, the Court sustained

[24] Subject to the duty to exert every reasonable effort to make and maintain agreements under sec. 2, First. This duty has been held to be similar to the requirement of good-faith bargaining under the National Labor Relations Act. *Trainmen v. Toledo P. & W. R. Co.*, 321 U.S. 50, 61 fn. 18 (1944).

[25] *Cf.* Labor Management Relations Act (Taft-Hartley), 29 U.S.C. 151 (Striking employee sec. 152, protected activities sec. 157, unfair practices sec. 158). Also see, *AEPA v. Southern*, E-18550, July 15, 1962, in which the Board based its opinion on the Toledo case and Taft-Hartley cases involving unfair labor practices.

[26] *Brotherhood of Loc. Eng. v. Baltimore & Ohio R. Co.*, 83 S. Ct. 691, 694 (1963) (Per curiam), quoting *Terminal Ass'n. v. Trainmen*, 318 U.S. 1, 6 (1942)—"The national interest * * * is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for." See generally, Cox, "Good-Faith Bargaining," 71 Harvard Law Review 1401 (1958).

[27] See, *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711 (1945). See also, *Pan American World Air. v. Flight Eng. Intern. Assoc.*, 306 F. 2d 840 (2d Cir. 1962); *Flight Eng. Intern. Assoc. v. Eastern*, 307 F. 2d 510 (2d Cir. 1962), certiorari denied, 83 S. Ct. 934 (1963).

[28] *E.g., Labor Board v. Insurance Agents*, 361 U.S. 477 (1960).

[29] *Labor Board v. Truck Drivers Union*, 353 U.S. 87 (1957).

harassing activities by a union of on-the-job conduct designed to interfere with the carrying on of the employer's business, as not an unfair labor practice under Taft-Hartley, nor a failure to bargain in good faith, but a legitimate use of economic pressure to attain a favorable contract. The rationale of the Court appears at page 490:

> Thus the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid. And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations. See S. Rep. No. 105, 80th Cong., 1st Sess., p. 2. Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union.

The payment of strike benefits by unions to strike employees has been a recognized, legitimate economic weapon in support of the strike power of unions.[30] The payment of insurance monies in labor disputes has been expressly legalized in Federal legislation.[31] While strike insurance among employers is relatively uncommon,[32] a strike insurance arrangement between members of the Association of American Railroads and 22 nonmember railroads was recently entered into and upheld in an action for damages brought by the BRC on behalf of union employees of the Long Island Railroad Company.[33]

The strike insurance plan in issue employed a foreign insurance company to provide the methods of handling the financial provisions of the plan. The minimum annual premium paid by each railroad equaled the daily benefit which was to be paid to the railroad in the event of a strike and was calculated in accordance with a formula based upon the fixed costs of the carrier during a strike. In the event of a work stoppage, the agreed-upon daily indemnities were paid to a struck carrier by the insurance company on certification by an advisory committee of the nonstruck railroads. On exhaustion of the "fund" the railroad members of the plan were billed daily by the insurance company for their proportionate shares as additional premiums.

The plan became effective in September 1959 and the Long Island Railroad Company was paid the sum of $50,000 per day for a work stoppage of 26 days which occurred in July and August 1960. In this action, in which it was alleged that the damage to the employees was the result of a strike taken by the railroad at the instigation of the carrier members of the plan, the court found generally, that the strike insurance plan was not in violation of the provisions of

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[30] Its use by employers as well as by unions in the collective bargaining process was recently recommended by the Independent Labor Study Group of the Committee for Economic Development in its report "The Public Interest in National Labor Policy."

[31] See secs. 4 and 13, Norris-LaGuardia Act (29 U.S.C. 104, 113) and sec. 20, Clayton Act (29 U.S.C. 52).

[32] In a recent case decided by the National Labor Relations Board involving the Publishers Association of New York City in which publishers of New York newspapers agreed to suspend operations in the event of an illegal strike against one, there is a reference to some form of insurance payments as a terms of the agreement. Publ. Ass'n. of N.Y.C., 139 N.L.R.B. 107 (Nov. 21, 1962).

[33] *Kennedy* v. *Long Island Railroad Company*, 211 F. Supp. 478 (S.D.N.Y. 1962).

the Railway Labor Act and not contrary to the purposes thereof. Specifically, it found that strike insurance was a legitimate economic weapon authorized under section 4 of the Norris-LaGuardia Act, and section 20 of the Clayton Act, and that the agreement *per se* did not constitute a violation of the carrier's duty to bargain in good faith.[34] The Court also held that the plan did not contravene the purpose of the Railway Labor Act to provide for the prompt and orderly settlement of disputes, and since the specific provision of the agreement in issue was not conditioned upon approval of the strike by the other railroads, did not introduce any element of multibargaining without the consent of the union. As far as can be determined, this is the only instance in which a strike insurance program between carriers under the Railway Labor Act has come before the courts and, of course, the decision is limited by its facts and the manner in which it arose.

PUBLIC INTEREST

The public interest which the Board has been charged by the Congress with protecting under the Act, is not the national public interest *per se* but a specialized public interest which embraces the national interest in a sound, efficient transportation industry "properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." Pursuant to this mandate, the Board has the responsibility to regulate air transportation in a manner so as to "foster sound economic conditions" in such transportation and this duty subsumes the "attainment of a degree of stability and efficiency in air transportation that freedom from industrial strife will provide."[35]

Prior to the enactment of the Act, Congress had prescribed the national policy relating to the regulation of labor-management relations in the air transportation industry by the enactment of title II of the Railway Labor Act in 1936. In so doing, it placed the air transportation industry *in genere* with the railroad industry and within the framework of labor legislation which had developed in that industry since 1888. However, by subsequently enacting section 401(k) of the Act, Congress made compliance with the Railway Labor Act a condition for holding a certificate of public convenience and necessity and, as a consequence, made the Board an enforcing agency of the Railway Labor Act insofar as air carriers subject to the Act are concerned. Although Congress in that Act also gave the Board the prerogative to regulate the air transportation industry solely as required by the public interest objectives set out in section 102 of the Act, it did not by this legislation transfer the general regulation of labor-management relations in the industry to the Board. Although the Board is invested with plenary authority within its sphere, its competency is in the field of air transportation

[34] On examination of the facts, it also found no absence of good-faith bargaining on the part of the railroad.

[35] See *Acme v. Civil Aeronautics Board*, 204 F.2d 263 (2d Cir. 1953); *Western Air Lines v. Civil Aeronautics Board*, 194 F. 2d 211 (9th Cir. 1952); *Outland v. C. A. B.*, 284 F. 2d 224 (D.C. Cir. 1960); See, *e.g.*, *United States v. Louden*, 308 U.S. 225 (1939).

and not in the area of labor relations.[36] It follows, therefore, that although not proscribed from regulating labor management relations in the industry, it should exercise extreme circumspection when acting within its sphere of authority over air transportation so as not to affect labor-management relations in a manner contrary to the national labor policy, unless, as in the correlated area of antitrust confliction, it finds its action is required "by a serious transportation need in order to secure important public benefits." In order to refrain from indirectly interfering with the national labor policy affecting air transportation embodied in the Railway Labor Act, it should accommodate its responsibilities under the Act to the provisions of the Railway Labor Act, if it is feasible to do so.[37]

In its prior decision approving the Pact, the Board recognized that matters of general labor policy were outside the scope of its statutory function unless the labor problems within the industry, if unrestrained, would jeopardize the objectives of section 102. Accordingly, it restricted its scrutiny of the Pact to a determination whether it would create an imbalance in labor-management relations in the industry extensive enough to constitute a "threat to the development of a stable and efficient air transportation system." On the basis of the record before it, the Board found no disparity in economic power either existed at the time or would be effected by the agreement which would jeopardize the attainment of the public interest objectives of the Act.

The unions do not contend that the Pact will effect an imbalance in bargaining power in favor of the carriers within the criteria set forth by the Board in its prior opinion. Rather, they disparage the efficacy of the Pact as threatening the economic well-being of the industry while failing to accomplish its principal objective, the neutralization of the unions' strike power. They deprecate the increasing deterioration of labor-management relations as deleterious to both labor and industry alike and make a plea for an alleviation of the warlike attitudes which the unions emphasize the Pact engenders. The unions see the Pact as a challenge, not because it creates an imbalance in economic power which cannot be countermanded by union action, but because it evinces an antiunion tradition and needlessly breeds an increasing intensity in combative attitudes between labor and management. In the words of their brief, the Pact is regarded by the rank and file of the unions as a "declaration of war" by the carriers. The unions believe that this trend should be reversed as contrary to the public interest since it can only lead to an arms race, accompanied by a mounting mistrust and an increasing deterioration in labor relations, with interruptions in air transportation, the inevitable result. Obviously, the unions are convinced that the approval of the Pact, in any of its gradations or forms, would be contrary to the Board's responsibility to "foster sound economic conditions" in air transportation, since it

[36] See *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156 (1962); *Outland* v. *C. A. S.*, note 134, *supra*.

[37] See, e.g., *Local Cartage Agreement Case*, 15 C.A.B. 850 (1952); *McLean Trucking Co.* v. *U.S.*, 321 U.S. 67 (1943); *Nat. Broadcasting Co.* v. *U.S.*, 319 U.S. 190 (1943). *Cf. American Overseas Airlines* v. *Civil Aeronautics Bd.*, 254 F. 2d 744 (D.C. Cir. 1958); *F. C. C.* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953); *United States* v. *Lowden*, 308 U.S. 225 (1939); *Brotherhood of Loc. Eng.* v. *Baltimore & Ohio R. Co.*, 83 S. Ct. 691 (1963).

threatens the stability of labor-management relations by engendering labor unrest as a consequence of the hardened attitude of management toward labor reflected in the step by step strengthening of the Pact.

The Bureau, although concurring with the unions as to the ultimate effect of the Pact, is persuaded that the "supplemental payments agreement" is forceful enough to achieve a "radical imbalance in bargaining weapons" with an attendant risk of serious and bitter industrial warfare which will result in a tendency toward Government intervention in the collective bargaining process contrary to the national policy. The Bureau sees the "supplemental payments agreement" not as a defensive economic weapon, but as an "active and positive tool" intended not only to neutralize the unions' ability to strike successfully but to impose either group bargaining under the posture of individual bargaining or involuntary group bargaining upon the unions. Although not effectual to deter strikes, the strengthened Pact will cause a unification of the unions and a coordination of their retaliatory efforts. This will result in an "arms race," with force begetting force, accompanied by a consequent hardening of attitudes and increasing mistrust, leading to an escalation of labor disputes and work stoppages. Although conceding that self-help is not objectionable *per se*, the Bureau believes that "when it reaches a level which appears to put pressure on labor to take drastic and forceful contermeasures * * * it must be limited." It seeks to distinguish the air transportation industry as an industry with a deep and pervading public interest, pointing out that what may be legally unobjectionable in other industries, such as strike insurance, and defensive lockouts, "may not be countenanced in air transportation, if the danger is thereby created of unacceptable disruption of service in so vital an area."[38]

The Bureau concedes that the record does not substantiate that there has been an increase in the number of labor disputes or breakdowns in collective bargaining which can be attributed to the Pact. It did not attempt to analyze the factual record, characterizing the evidence relating to the operation of the Pact as inconclusive. It ascribes the absence of any evidence that the Pact has operated contrary to the public interest to the atypical labor problems which have confronted the industry during the period the Pact has been in effect. Its predictions of deteriorating labor relations in the industry and adverse effect upon the public interest, is admittedly not based upon factual evidence and, therefore, is solely a rationalism which the examiner believes is premised upon a mistrust of the carriers' motives and the Bureau's apprehension of the consequent danger to the public interest. An analysis of its argument clearly shows that the Bureau is convinced that the carriers' ultimate objective is group bargaining to be achieved either indirectly, as a result of the influence of the Pact members as a group on an individual

[38] "But air transportation is unquestionably an essential public service, and an agreement subject to Board approval which may tend strongly to increase the frequency, duration and intensity with which the public is deprived of air service should not be approved by the regulatory body absent a compelling showing of some overriding need therefor. The Bureau believes that the supplemental payments provision of the Pact presents such dangers, and that the carriers have shown no overriding need sufficient to warrant such risks." Bureau Brief p. 18.

carrier or directly by the concerted action of the Pact members forcing the unions to accept this type of bargaining. The Bureau foresees a union reaction to the imbalance created as a result of the Pact leading to "embittered labor relations and more widespread work stoppages."

The reactions anticipated may be summarized as: (1) Union retaliation against the "allies of the carrier" with which it has bargained to an impasse. (2) A movement among the unions to develop common contract termination dates in order to facilitate simultaneous strikes against a group of carriers. (3) The reactivation of the AATU or similar cooperative activity among the unions. (4) A hardening of the union attitude toward management, with an eroding of mutual trust and "an interference with serious, good faith, collective bargaining." (5) "A progressive escalation of counter moves, possibly in violation of law which would endanger the safety and convenience of the public and the Nation." These union activities and consequent disruption of air transportation, in the opinion of the Bureau, must lead inevitably to increased Government intervention to protect the public interest.

The Bureau candidly admits that the effects which it foresees may never come to pass, but believes that the possibility of these eventuating in the absence of a showing of a clear advantage to the public interest, is adequate to support a finding that the "supplemental payments agreement" is not in the public interest.[39]

Upon the sole basis of its prediction of the dire effects of the "supplemental payments agreement" upon labor relations in the industry, it concludes that the supplemental payments provision should be disapproved as constituting "too large a risk" to be consistent with the public interest. It nevertheless would approve the "windfall" agreement if limited to the recovery of the actual expense incurred by a carrier during a strike less any revenues received. In order to avoid an inconsistency, the Bureau justifies its approval of a limited "windfall" agreement upon a distinction based upon the reasonableness of the effectiveness of the means used, finding the "windfall" agreement a reasonable defensive economic weapon, and the "supplemental payments agreement," not.[40]

The Bureau's rationale is equivocal. It would permit limited self-help to assist a carrier to resist union demands, but would deny self-help as unreasonable if it reaches a level whereby it becomes effectual.[41] Paradoxically, the parameter which the Bureau uses in determining reasonableness of permissible self-help is the intensity of

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[39] "The Bureau is aware that this state of affairs has not come to pass, as yet. Perhaps, it will not. The unacceptable effects on the Nation's air transportation which we have suggested do not have to be an accomplished fact, or even an imminent likelihood, to compel the Board to disapprove the supplemental provisions. It is enough, in the absence of any clear advantage to the public interest flowing from the agreement as it now exists, that there is a strong possibility of those results."

[40] Both the union parties and the carrier parties deny the concept of reasonable or unreasonable economic weapons in a labor dispute; the union parties citing the Board's previous determination that any economic weapon which worsens labor-management relations in the air transportation industry is adverse to the public interest; and the carriers on the premise that the national labor policy prevents the Government from interfering with the choice of economic weapons in a labor dispute. However, the examiner is of the opinion, as will be discussed, *infra*, that when considering public interest objectives under the Act, the reasonableness of the economic weapon is a proper factor to be considered.

[41] It appears quite evident that the unions do not subscribe to this theory. They object to the mutual assistance principle in totality on broad grounds that mutual assistance arrangements among the carriers are adverse to the broad public interest objectives of the Act and as defeating the purposes of the Railway Labor Act.

the counteraction to be expected from the unions. While professing no desire to interfere with the self-help permitted the carriers, the Bureau views the "supplemental payments agreement" as an unreasonable means of providing economic self-help unnecessarily inimical to stable labor relations because "dangerously inappropriate and unacceptably severe for the industry" and motivated to accomplish its ultimate objective, group bargaining in substance.[42]

Unless the examiner has greatly misconstrued the Bureau's argument, its judgment that the "supplemental payments agreement" is adverse to the public interest is not grounded, in actuality, upon any imbalance in economic bargaining power, but upon an anticipated danger to the public interest from the consequences which might result from a strengthening of the carriers' bargaining power. The risk of industrywide labor unrest causing disruptions in air transportation is a threat to the public interest and as a matter of policy, should not be sanctioned by the Board unless the proponents of the agreement which endangers the public interest can justify the necessity for the risk. Perhaps it is best to let the Bureau's brief speak for itself:

> Even if the carriers had been able to substantiate their claims, this would not justify an agreement which would tend to violate the RLA and endanger the public interest. Nor is the Bureau attempting to decree what sort of self-help is or is not permissible for carriers or unions. We urge, rather, that there are tendencies which can not be ignored or minimized arising from the supplemental payments provision which threaten to ignite the kind of strife which leads to severe and prolonged shutdowns, or to subversion of the collective bargaining process contemplated by the RLA, or both. The carriers have not and, it is submitted, can not offer adequate justification for acceptance of this risk.

Whether the Bureau's predictions of embittered labor relations and widespread strikes resulting in disruptions in air transportation will ultimately prove to have been justified, is a matter of opinion.[43] While the Bureau's desire to protect the public interest is commendable, the risk which it believes threatens that public interest is based upon inchoate inferences of "tendencies" threatening "strife which leads to severe and prolonged shutdowns" and the "breakdown of the collective bargaining process" in the industry. Upon analysis, this argument is in essence an argument directed against the national labor policy which permits the unrestrained use of economic power by both parties after an impasse in good-faith collective bargaining has been reached. Obviously, any strengthening of a collective bar-

[42] The Bureau reasons that the carriers had the opportunity to make the level of supplemental payments as high as they believed necessary and that by choosing the limits which they did, they chose a level adequate to achieve the desired objective of financial assistance "which would have to be insured during potential strikes, if a group bargaining proposal were to be workable." They further stated: "To sum up, the record indicates quite clearly that a major purpose of the Pact was to restrict the unions' unlimited access to the traditional bargaining tools, notably the strike; supplemental payments under Paragraph (B), by removing the element of uncertainty of strike-period benefits is admirably suited to this task and provides for substantially greater economic power to produce the desired results than would the windfall payments alone; and the evidence is that the carriers developed the benefits level required to do the job and then wrote it in the agreement." [Footnote omitted.]

[43] In disposing of a similar contention of the unions in its prior opinion the Board succinctly stated:

"Secondly, we cannot accept the bare, unsupported contention that the agreement will result in an expansion of the area of labor disputes and industrywide strikes. The record before us does not support the inference that the existence of the agreement would persuade unions, as a matter of strategy or of retaliation, to strike against carriers with whom they have no uncompromisable dispute. The mere augury of industrywide strikes, incorrectly predicted under similar circumstances once before, is insufficient to warrant a conclusion that the agreement will destroy workable labor relations in the industry."

gaining position will result in a counteraction by the other party in a strategic attempt to equalize the economic pressures. This is inherent in the collective bargaining process which has as its major objective the reconciliation of antagonistic viewpoints in an atmosphere of free bargaining in good faith. Essential to the process are the economic pressures which can be brought to bear in the event the parties' enlightened self-interests are insufficient to effect a reasonable settlement of their differences.

The Bureau manifestly views the natural consequence of the collective bargaining process in which economic weapons are unrestrained as affecting the public interest in air transportation adversely. Although the adverse effect would be subsequential and any interruptions in air transportation would result from union reaction and not from any inherent invalidity of the agreement itself, the Bureau believes the public interest overrides the national labor policy which would permit the use of this means of economic pressure. It would, therefore, as a matter of policy, restrict the carriers from entering into an agreement, otherwise valid as a collective bargaining tool, because of anticipated union reaction adverse to the public interest. Although not stated, it is inferred that the Bureau's position is based, in part, upon a realistic approach stemming from the Board's one-sided jurisdiction. Since unable to regulate the unions, the Bureau would regulate the economic weapons available to the carriers in order to maintain the labor peace.

While the Board unquestionably has the authority to limit the extent to which air carriers, by combination, pooling, or agreement, may create or use economic weapons in the collective bargaining process, if such restrictions were necessary to attain the public interest objectives of section 102; its exercise of this power would be in contravention of the national labor policy enunciated by Congress in the Railway Labor Act. By taking such action, the Board would be indirectly intervening in the area of labor-management relations and artificially affecting the normal balance of economic power between the parties. As a corollary, the substantive provisions of collective bargaining contracts between the carriers and their employees would reflect the effects of the resulting imbalance.

As was pointed out by the Court in *Labor Board* v. *Insurance Agents, supra*,[44] the regulation of economic weapons would restrict a party's capability to bargain effectually and the potential injury to the public interest might require the Government to enter actively into the negotiation of collective bargaining agreements. The Government's traditional passive role in the collective bargaining process is particularly applicable to the Board since, under the Act, its authority over labor management relations in the air transportation industry is incomplete, being limited to the regulation of only one party, the carrier. In addition to the statutory limitation of its authority, the Board and the courts have recognized that the competency of the Board lies in air transportation and not in the labor-management relations area. In the opinion of the examiner, a policy decision curtailing the use by air carriers of an economic weapon not invalid under the national labor policy, in the absence

[44] Quoted *supra* at 608.

of a manifest substantial "need," would be an improvident exercise of discretion.[45] The Bureau has not shown a "need" but rests its case upon the alleged failure of the carriers to prove the antithesis. Regardless of the burden of proof, the examiner has scrutinized the entire evidence in this record and cannot find substantial evidence of a "need" in the public interest sufficient to sustain a "policy" decision disapproving the agreement.

The carriers' arguments of the necessity for a mutual assistance agreement to counter the unions' strike power have been summarized previously and will not be repeated in detail. They contend, generally, that the agreement is consistent with the public interest objectives of section 102 of the Act and, in fact, furthers those objectives by partially offsetting the disparity in economic power which they claim exists in favor of the unions in the absence of mutual assistance. They justify the execution of the agreement as a valid defensive economic weapon which, by acting as a deterrent to the unions' use of its strike power, furthers the purposes of the Railway Labor Act by permitting more reasonable settlements of labor disputes through the use of the collective bargaining process. They assert that an imbalance in economic power unfavorable to a carrier is caused principally by two factors (1) the vulnerability of a single air carrier to a strike or a threat of strike because of the unusually severe economic impact thereon, and (2) the misuse of the unions' right to strike, both legal strikes to enforce unreasonable demands, and illegal walkouts, the effect of which cannot be averted by legal means due to an inadequacy of judicial remedies to deal effectively with illegal or threatened illegal strikes.

The carriers compiled an extensive record of documentary and testimonial evidence to show a need for financial assistance and to justify the means adopted to provide it. The evidence introduced is mostly uncontroverted. These records show that losses were incurred to Pact members due to strikes during the period in which the Pact has been in effect, up to and including December 31, 1962, of approximately $75 million. A tabulation of these losses, keyed to individual carriers and strikes, is contained in the footnote.[46] This tabulation is complete except for two short strikes of 7 and 6 days,

[45] *Burlington Truck Lines* v. *U.S.*, note 36 *supra* at 610.

[46] See the following (in thousands):

[In thousands]

Strike	Strike period loss	Profits lost—strike period	Mutual aid received	Net strike loss
CAP-IAM 1958	$3,616	$1,332	$2,619	$997
TWA-IAM 1958	5,094	493	2,372	2,722
EA-FEIA and IAM 1958	6,886	(727)	1,090	5,796
AA-ALPA 1958–59	11,398	1,750	3,372	8,026
EA-ALPA 1960	6,500	824	951	5,549
NW-IAM 1960–61	5,250	(342)	3,601	1,649
AA-FEIA 1961	1,466	(562)	1,059	407
EA-FEIA 1961	3,913	1,135	198	3,715
PAA-FEIA 1961	3,001	(32)	121	2,880
TWA-FEIA 1961	2,403	(807)	699	1,704
EA-FEIA 1962	25,224	2,765	15,788	9,436
Totals	74,760	5,829	31,840	42,920

The data for the Eastern strike in 1962 are from preliminary figures supplied in the carrier parties' brief. Appendix II reflects the latest data compiled by the Office of Carrier Accounts and Statistics for the examiner from the carriers' final fourth quarterly reports for 1962.

respectively, affecting National in 1961, figures for which are not available. A computation which includes statistics taken from the final fourth quarter reports filed by the carriers for the calendar year 1962, indicates that $32,176,402 has been paid to date under the Pact to struck carriers.[47] Based upon figures available at the time briefs were filed, the carriers computed net losses, after receipt of mutual aid, occasioned by strikes against Pact members of almost $43 million. The net loss reported includes estimated losses in profits or reduction in expected losses, as the case may be, during the strike period but does not include nonoperating expenses incurred.

The "windfall" agreement was effective over the period, October 20, 1958, through December 31, 1961, and $16,160,000 was paid by Pact members as net "windfall."[48] Over and above these payments, the carriers reported net strike losses of $33,484,000. The "supplemental payments agreement" has been effective since January 1962, and, although strikes were called against Pan American and Eastern by the FEIA, only the Eastern strike resulted in a shutdown of flight operations. The shutdown of flight operations started on June 23, 1962, with partial operation beginning on July 23, 1962, and a normal seasonal schedule resuming on September 13, 1962, a total of 82 days. Under the Pact, Eastern was paid total benefits of $16,016,402, of which $6,070,717 represented "windfall" payments under clause A of the agreement, and $9,945,685 in supplemental payments under clause B thereof.[49] It is alleged in the carriers' brief that Eastern's strike losses exceeded by more than $9 million the mutual aid payments received under the agreement.[50]

The carriers also contend that in addition to direct strike losses there are other losses which are not reflected in these figures. These include prestrike losses due to threats of strikes, poststrike effects which continue for a period of months, the loss of market identity, extraordinary strike expenses, unusually high expenses of attempted partial operations, and direct losses due to lessened operating efficiency.

The record clearly shows that air carriers as a class are particularly vulnerable financially to strikes and that even with mutual assistance, strikes have been costly to the Pact members over the past 4 years. Whether the Pact has had a material effect upon either the number or costs of strikes to the Pact members as a group, is an important issue in this proceeding. Since the basic objectives of the Pact include a reduction in the number of strikes and the consequent losses to the Pact members as a group, the effectiveness of the Pact should be measured by this standard.[51] The strike record over the period the Pact has been effective will be examined further but before doing so, a contention of the unions deserves comment.

The unions readily concede that a strike is a considerable financial burden upon a carrier and that the resulting economic pressure upon

[47] See appendixes G and H.

[48] A breakdown of "windfall" payments by paying and receiving carriers is contained in appendix G. The figure in the text includes "windfall" payments made to National in the two strikes for which loss figures are not available.

[49] Payments and receipts based upon final fourth quarter reports for calendar 1962 are tabulated in appendix H.

[50] $2,765,000 of this represents profits allegedly lost by Eastern during the strike.

[51] The unions cogently argue that the agreement is against the public interest as not fostering sound economic conditions in air transportation, since it rewards the carrier which has the most unstable labor relations at the expense of those which have no labor difficulties.

the carrier to settle its labor dispute is the objective of a strike. However, they point out that the Railway Labor Act contemplates the exercise of economic pressure to effect a settlement of a labor dispute and that strikes are not proscribed regardless of losses to either party. Consequently, they argue that losses resulting from a strike are immaterial and cannot serve a public interest justification for the Pact. The examiner is unable to accept this argument.

Obviously, the Board cannot take any direct action to limit the strike power of the unions or their unquestioned right to exercise economic weapons permitted under the national policy of the Railway Labor Act. It would appear equally evident that if it were shown that the unrestrained use of the union's strike power was so costly to the air carriers as to affect the public interest objectives under section 102, the Board has both the power and the responsibility to protect the public interest which, though limited to the regulation of the carriers, could be effected by approving an agreement for self-help entered into by the carriers to reduce the impact on the public interest. This action by the Board would not constitute an interference with an economic weapon of the unions, but a sanctioning of an economic weapon of the carriers which they are proscribed from exercising under the Act without Board approval.

The carriers contended that the strikes which the industry has experienced over the period the Pact has been effective are, in part, a result of the union's misuse of their strike power. The record relating to labor disputes in the industry is fairly complete, covering in detail the disputes which have occurred since 1958 and generally the period since the end of the last war. A portion of an exhibit of the carriers for the period during which the "windfall" Pact was effective, October 19, 1958, through December 31, 1961, is reproduced in the footnote [52] and contains a list of all strikes in the industry.

[52] See the following:

Carrier	Date work stoppage—		Duration (days)	Union
	Began	Ended		
Capital [1]	Oct. 17, 1958	Nov. 22, 1958	37	IAM
West Coast	Nov. 21, 1958	Nov. 23, 1958	3	IAM
Trans World [1]	do	Dec. 7, 1958	16	IAM
Lake Central	Nov. 23, 1958	Dec. 5, 1958	13	ALSSA
Eastern [1]	Nov. 24, 1958	Jan. 1, 1959	38	FEIA
Eastern [1]	do	Dec. 15, 1958	22	IAM
American [1]	Dec. 20, 1958	Jan. 10, 1959	22	ALPA
Pacific	June 5, 1959	June 8, 1959	3	ALDA
Southern	Aug. 1, 1959	Oct. 5, 1959	63	ACMA
Flying Tiger	Jan. 21, 1960	Feb. 16, 1960	27	TWU
Mohawk	Mar. 17, 1960	Apr. 3, 1960	18	ALEA
Southern	June 5, 1960	Sept. 30, 1960	117	ALPA
Continental [1]	June 29, 1960	Oct. 10, 1960	103	FEIA
Eastern [1]	June 11, 1960	June 22, 1960	11	ALPA
Braniff [1]	Sept. 26, 1960	Oct. 5, 1960	10	BRC
Pan American [1]	Oct. 1, 1960	Oct. 2, 1960	1	FEIA
Northwest [1]	Oct. 11, 1960	Feb. 24, 1961	137	IAM
American [1]				
Trans World [1]				
Eastern [1]				
National [1]	Feb. 18, 1961	Feb. 24, 1961	7	FEIA
Pan American [1]				
Flying Tiger				
Western	Feb. 18, 1961	May 11, 1961	82	FEIA
National [1]	May 2, 1961	May 7, 1961	6	IAM

[1] Pact members.

Source: Joint exhibit 6.

This exhibit indicates that 20 strikes occurred in the industry as a whole since the "windfall" agreement became effective.[53] Pact members were involved in 12 strikes, one of which was an illegal strike, in effect, a strike against the Government over a decision of the National Mediation Board, which closed down the flight operations of five Pact members, as well as two non-Pact members, for a period of 7 days in February 1961. A second illegal strike occurred in June 1960 on Eastern which lasted 11 days and was also, in purpose, a strike against the Government in protest of an order of the Federal Aviation Agency over the seating of inspectors in the third pilot seat during flight checks. During this period the record indicates that there were 20 instances, some of which involved several carriers, in which temporary restraining orders or injunctions were issued against illegal or threatened illegal strikes. Eleven of these court orders were issued after the illegal strike had begun, and in a number of instances the walkouts continued in disregard of the court orders.

The carriers deny the contentions of the unions that the factual record proves the Pact to have been the cause of the increased number and severity of the strikes which occurred in the industry. They negate the allegation that the Pact had any influence on the long strike of ALPA against Southern and other feeder carriers since these carriers are subsidized carriers. They cite the fact that except for the IAM controversy which resulted in strikes involving Capital, TWA, and Eastern in 1958,[54] the Pact members have been relatively free of strikes involving negotiation of routine collective bargaining agreements relating to the negotiation of rates of pay, rules, or working conditions. Since that controversy, there has been only one strike involving economic questions solely in which a Pact member's flight operations have been shut down. This was a strike of 6 days' duration in May 1961, called against National by IAM and concerned mechanics' working conditions.[55] They do not deny that there has been unusual strike activity and labor disputes, but point out that since early in 1958 the Pact members, as well as other carriers in the industry, have been almost continuously involved in labor disputes which have had their roots in a jurisdictional representation controversy between two major air transport unions representing flight crew members.

It is evident from the mass of evidence in the record that this controversy has been the primary cause of labor-management disputes, at least since early in 1958. The National Mediation Board annual reports also reflect that mediation and arbitration procedures of that Board have been invoked in a large number of instances in which the negotiation of collective bargaining contracts between air

[53] The Capital strike in 1958 is included although it began prior to the execution of the agreement since it may reasonably be assumed that the mutual assistance principle may have had some influence thereon, either initially or in prolonging its duration.

[54] This controversy arose prior to the execution of the Pact. Capital was struck on Oct. 17, 1958; TWA and Eastern were struck after the execution of the Pact—Nov. 21 and 24, 1958, respectively.

[55] In the fall of 1960, the BRC also called a strike related to economic matters involving ground personnel against Braniff which continued for 10 days, but did not result in a shutdown of flight operations.

transport unions and air carriers have been complicated by this issue. In addition, 10 of the 14 Emergency Boards created by the President under section 10 of the Railway Labor Act since July 1958, in disputes between air transport unions and members of the Pact, concerned the crew complement controversy. Of the five Presidential Emergency Boards (Nos. 120–124) which issued reports in 1958, prior to the execution of the Pact, only one Board (No. 122) appointed to mediate the IAM disputes with Eastern, TWA, Northwest, Northeast, Capital, and National, was created for a dispute not related to the crew complement jurisdictional question. Nine Presidential Emergency Boards have been appointed since the Pact became effective and of these six concerned the same jurisdictional representation dispute.[56]

This jurisdictional controversy, primarily between the ALPA and the FEIA, became a matter of national importance in 1961, set off by an illegal strike by the flight engineers on February 17, 1961. This illegal walkout closed down the flight operations of seven air carriers[57] and created a national emergency in the air transportation industry which caused the intervention of the Labor Department and finally the issuance by the President of two Executive Orders establishing a special commission to inquire into the controversy. This special commission previously referred to as the Feinsinger Commission, in its initial report related this controversy to technological advances in the industry.

> During the past decade, the air transport industry has been plagued by labor troubles and work stoppages. Even before the advent of the jet age, the industry was troubled by disputes involving flight crew composition and qualifications, collective bargaining representation, and job security of flight crew personnel.
>
> The introduction of turbine-powered aircraft in recent years has greatly aggravated and accentuated those cockpit problems. Jets fly much faster and carry more passengers than the most advanced piston types. Technological progress has meant increased productivity, a rapid increase in this case. One B–707 or DC–8 can perform the work of more than fifteen DC–3's or three DC–7's.
>
> As in other branches of industry, technological change in air transport has renewed questions about employees' qualifications and training, has caused concern among flight personnel for their job security and future employment opportunities, and has created friction between two labor organizations, the Air Line Pilots Association (ALPA) and the Flight Engineers' International Association (FEIA).

The dual representation of the flight crew complement on the major air carriers, including the Big Four and Pan American, is

[56] See the following:

Board No.	Airline/Union	Date created	Report issued
135	PAA v. FEIA	Feb. 17, 1961	June 20, 1961
136	NW v. IAM	Feb. 24, 1961	May 24, 1961
142	TWA v. ALPA	Nov. 1, 1961	Dec. 15, 1961
143	PAA v. ALPA	Nov. 10, 1961	Dec. 10, 1961
144	EA v. FEIA	Feb. 22, 1962	May 1, 1962
146	TWA v. FEIA	Mar. 20, 1962	Do.

[1] On NW the flight engineers are represented by the IAM.

[57] AA, TWA, EA, NA, PAA, WA and UT. NW was already shut down by a legal strike of its flight engineers.

an outgrowth of a decision made by this group of air carriers in 1948,[58] to fill the flight engineer's seat required for four-engine aircraft with a flight engineer having a mechanical background. As a result of this decision, the flight engineers on these carriers were given the status of a separate class or craft and FEIA was chartered as an international union to represent those flight engineers with mechanical backgrounds.[59] Certain of the other air carriers, including Capital, Braniff, Delta, and Northeast[60] implemented the requirement for a flight engineer by using licensed pilots with flight engineer certificates[61] who were represented by ALPA. These carriers have been relatively free from strikes from any cause and according to the record which goes back to 1946, have not had a strike involving flight crew personnel.

The jurisdictional fight between ALPA and FEIA may be said to have begun in 1954 when ALPA, anticipating the advent of jet equipment on the airlines, announced a policy requiring flight crew members on all turbine aircraft, prop and pure jet, to be pilot-qualified so as to assure a "fail-safe" crew. Although this policy was subsequently amended so as to require a minimum of three pilots only on pure jets, this controversy became acute in 1958 when both ALPA and FEIA threatened strikes against Eastern, with ALPA demanding an all-pilot crew for the new turbine aircraft which Eastern was placing in service, and the FEIA insisting on a requirement for A&P mechanic certificates in addition to flight engineer certificates for the flight engineer position. The situation resulted in the appointment of two Presidential Emergency Boards (Nos. 120 and 121) with the same members to deal concurrently with the two related controversies. These Boards issued reports, known as the Cole Board recommendations, which recommended that on pure jet aircraft the flight engineers be required to obtain a commercial pilot certificate with an instrument rating in order to be able to serve as a third pilot in times of an emergency. Although Eastern and ALPA accepted these recommendations, FEIA rejected them and struck Eastern on November 24, 1958, a strike which lasted for 38 days. This strike was settled when Eastern agreed to a requirement in its contract with FEIA that flight engineers hold A&P mechanic certificates.[62]

Meanwhile, ALPA was insisting upon "fail-safe" crews and struck American over this issue on December 20, 1958, for a period of 22 days. As a consequence of this strike, Eastern, TWA, Pan American, and American entered into contracts with ALPA which provided for a minimum of three qualified pilots on all pure jet aircraft, which, because of their prior contracts with FEIA, compelled the carriers to carry a crew of four. In June 1960, Continental was struck by FEIA over the mechanic certificate issue and sustained a partial shutdown of its jet operations for a period of 105 days. In

[58] The date the CAB first required certificated flight engineers on certain four-engined aircraft then coming into service on the airlines.

[59] Northwest's flight engineers were represented by IAM.

[60] National had required its flight engineers to be holders of A&P certificates, as well as qualified pilots with commercial certificates and instrument ratings.

[61] The requirements for a flight engineer certificate can be satisfied by either pilots or mechanics.

[62] In the interim, Pan American, TWA, and American had signed similar contracts with FEIA.

this controversy, the FEIA lost its representation of the flight engineers to ALPA.[63] Pan American was struck by FEIA for 1 day in October 1960. Also in that month, the IAM flight engineers struck Northwest, October 11, 1960. This strike which initially only affected pure jet equipment resulted in a partial shutdown of flight operations which lasted until January 9, 1961, when the strike spread to all equipment. The appointment of a Presidential Emergency Board on February 24, 1961, required the flight engineers on Northwest to return to work. This Board issued its recommendations on May 24, 1961, and at the time of this writing, negotiations are still continuing between IAM and the air carrier.

The principal controversy with FEIA was touched off in 1959 when ALPA filed a representation proceeding pursuant to section 2, Ninth, of the Railway Labor Act with the National Mediation Board to determine the class and craft of the flight crew members on aircraft of United. In an unusual proceeding, the first and only occasion on which the National Mediation Board has exercised its special statutory authority therefor,[64] the National Mediation Board on November 16, 1959, appointed a committee of three neutral persons to exercise its function under the Railway Labor Act and hear the issue. This special committee, known as the Donaldson Committee, conducted extensive hearings, with both FEIA and ALPA participating, for a period of more than a year and issued its findings on January 17, 1961, *i.e.*, that the flight crew members on United aircraft constituted one class or craft for the purposes of representation and collective bargaining.[65] The National Mediation Board thereupon issued an order calling for a representation election, the result of which, because of the numerical superiority of pilots to flight engineers of three to one, was a foregone conclusion. In an effort to force a reversal of this decision, the FEIA flight engineers walked off their jobs on seven airlines on February 17, 1961.[66] Although court injunctions were immediately obtained by several of the carriers, the strikes continued. On February 21, 1961, the President, acting on the recommendation of the Secretary of Labor established a special commission of three public members, headed by Professor Nathan Feinsinger, to hear and report on the controversy.[67] Prior to Executive Order 10921, establishing this commission, the Secretary of Labor had obtained an agreement of the carriers, except Western, to forego disciplinary action and to maintain the *status quo* until the report of the special commission. He similarly obtained an agreement from ALPA to forego any action during this period and upon these conditions the flight engineers returned to work on February 24, 1961.[68]

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[63] *Flight Engineers Inter. Ass'n v. Continental Air Lines, Inc.*, 297 F. 2d 397 (9th Cir. 1961) certiorari denied 369 U.S. 871 (1962). (Sustained.)

[64] *UMA Chapter, Flight Eng. I. Ass'n v. National Mediation Bd.*, 294 F. 2d 905 (D.C. Cir. 1961) (Sustained.)

[65] Findings Upon Investigation—In Re: ALPA & FEIA—National Mediation Board, Case #C-2946.

[66] See note 57 *supra* at 619.

[67] See note 21 *supra* at 572.

[68] Western refused to agree and discharged its flight engineers who refused to return to work, replacing them with pilot-engineers represented by ALPA. FEIA's complaint against Western was dismissed by the Board, without docketing, order E 17757, Nov. 24, 1961. Western's action was also sustained by the courts. *Western Air Lines v. Flight Engineers Internat'l Ass'n*, 194 F. Supp. 908 (D.C., Cal. 1961).

The Feinsinger Commission issued two reports: a preliminary report on May 24, 1961, setting down guidelines for a settlement of the controversy; and a supplemental report on October 17, 1961, making specific recommendations for the settlement of the controversy. In its initial report, the Commission, although characterizing the illegal strike by the flight engineers as irresponsible and unreasonable, and a strike against a decision of the Government, apportioned the fault for the bad deterioration of labor relations in the industry which it found among FEIA, ALPA, and the carriers. The Commission recommended a merger or consolidation of the two unions might be effected along the lines recommended by the Executive Council of the AFL/CIO in 1958. It also recommended the transition to three-man all-pilot crews on pure jet aircraft, with job security provisions for both pilots and flight engineers displaced by the transition. All new flight engineer hires would be pilot qualified but the incumbent flight engineers on jet aircraft would have priority to qualify at company expense for these positions. On prop aircraft, flight engineers would not have to become pilot qualified, and existing flight engineers would have priority for these seats. Both flight training for qualified flight engineers and flight engineer training for pilots would be accomplished at company expense but on the employee's own time. Loss of job opportunities because of the transition would also be compensated.

The Commission was highly critical of the rivalry and lack of cooperation between the unions which had been adamant in their respective positions in disregard of the public interest and the suggested solutions of all concerned, including that of their parent organization, the AFL/CIO. However, it also was critical of carrier managements' handling of the dispute, stating:

> The carriers act like helpless victims caught in cross fire between two hostile forces. To some extent, this is true. The erosion of the carriers' bargaining strength, however, has resulted in part from their failure to accept their managerial responsibilities and their tendencies to temporize and to seek the expedient solution. Hoping by such means to avert strikes, they have only laid the foundation for more serious strikes. A prime example is the decision made on the eve of the introduction of turbojets. Those aircraft require a crew of only three for safe and efficient operation. Two sensible choices were available to the carriers. They could have elected to use either a crew consisting of three pilots, one of whom possessed a flight engineer's certificate, or a crew of two pilots and a non-pilot flight engineer. Instead under bargaining pressures from ALPA and FEIA, American, Eastern, Pan American, and TWA chose both courses by establishing a four-man crew of three pilots and a flight engineer. Subsequently, Western and Flying Tiger signed contracts that followed suit.

While the carriers insisted upon reducing the flight crew on pure jets from four to three men, they were willing to accept the recommendations of the Feinsinger Commission which, obviously, would be costly to the carriers. The FEIA was unwilling to accept any compromise of its position and turned down any suggestions for a merger of the two unions. The situation was stalemated despite the efforts of the Government to effect a compromise, and in an effort to marshal public opinion, the Feinsinger Commission issued its second report

on October 17, 1961. Upon receipt of this report, the President endorsed the recommendations of the Commission, stating:

> It is my firm and strong belief that it is the obligation of the carriers and the unions to negotiate a final settlement of their differences on the basis of these recommendations. They must in the light of overriding public interest resolve their differences at the bargaining table.

Although negotiations under the auspices of the National Mediation Board and the Labor Department continued subsequent to the issuance of the second report, no satisfactory settlement of the basic controversy could be worked out, primarily because of the unyielding attitude of the unions.

On November 6, 1961, ALPA announced a strike against Pan American which was prevented by the appointment of Presidential Emergency Board No. 143. After this Board reported on December 10, 1961, relying on the Feinsinger recommendations, strike notices were sent out by ALPA, but were withdrawn upon the intervention of the Secretary of Labor. Similarly, FEIA, which had been free to strike since June, set several strike dates which were withdrawn at the inducement of the Government. At the urgent request of the President, ALPA's dispute with Pan American was submitted to binding arbitration under the auspices of the National Mediation Board, and the Arbitration Board (Taylor Board) issued an award following the Feinsinger Commission recommendations on May 21, 1962. Meanwhile, Emergency Boards (Nos. 142 and 146) had been appointed in the controversies affecting TWA and ALPA/FEIA. These Boards submitted reports December 15, 1961, on the dispute with ALPA and May 1, 1962, on the dispute with FEIA. Both reports followed along the Feinsinger recommendations. Eastern's controversy with FEIA was developing along similar lines, the negotiations being carried on under the auspices of the Feinsinger Commission and of the Secretary of Labor. After a strike call was issued by FEIA on February 21, 1962, the President created Emergency Board No. 144 (Kheel Board) which issued its report on May 1, 1962, also following the recommendations of the Feinsinger Commission.

It may be said that in each and every case, the carriers generally accepted the conditions for settlement set down by the Emergency Boards. Contrarily, the FEIA rejected the recommendations of all the Emergency Boards, and by June 1, 1962, was in a position to legally strike Pan American, TWA, and Eastern.[69] Practically continuous meetings and negotiations, both in New York and Washington, under the auspices of the Government, in which all the interested agencies had some part, were conducted during June. On June 14, 1962, FEIA rejected the President's request to submit its dispute with the carriers to arbitration. However, on June 21, the Secretary of Labor announced a settlement in principle of the dispute of FEIA and TWA, subject to the ratification of the individual flight engineers. On June 22, 1962, FEIA turned down a proffer of media-

[69] American's contracts with the FEIA and ALPA were still effective and although negotiations were being conducted, American was not faced with an immediate strike situation. At the time of this writing, negotiations are being conducted by American with both unions.

tion by the National Mediation Board which caused President Kennedy to issue a statement the following day regretting the spurning of this offer by FEIA and indicating that the TWA settlement opened up a way "for a sensible and equitable resolution of the issues in dispute." He characterized the FEIA decision to strike Eastern and Pan American as the "height of irresponsibility." Nevertheless, FEIA struck both Eastern and Pan American on June 23, 1962. Pan American immediately obtained a temporary restraining order by a Federal district court and while the restraining order was still in effect entered into a settlement with FEIA along the lines of the TWA settlement.[70] Eastern, however, elected to take the strike and immediately furloughed all but 1,000 of its 18,000 employees.

During the strike which ensued, negotiations continued under the auspices of the Government and on July 23, 1962, after Eastern had announced plans for resuming partial flight operations, the Secretary of Labor recommended a settlement which included submitting all the unresolved economic issues to arbitration. This settlement provided for the parties to enter into an agreement to continue negotiations regarding the crew complement issue within a framework of basic principles which had previously been discussed and subject to the concurrence of the Eastern pilots. Eastern's management, however, refused to accept the recommendation—Mr. MacIntyre, its president, making the following statement: "After three strikes by the flight engineers over this issue, we cannot accept a resolution that amounts to a 'truce' in this regard with no assurance of Pilot acquiescence." FEIA on the day following Eastern's rejection of the proposal, accepted the recommendation of the Secretary with a proviso that the agreement to negotiate be signed prior to the flight engineers returning to work. This concession, the first on FEIA's part, did not result in any change in the position of Eastern's management which continued its efforts to resume flight operations.

During late June and early July, negotiations between Eastern and both ALPA and FEIA continued with the Government cooperating. In addition, legislation was drafted by the Department of Labor which was introduced in the Senate by Senators Monroney, Morton, Randolph, and Smith as S. 3540. Efforts to obtain legislation, however, were permitted to lapse when it became apparent that the strike would be confined to Eastern's system alone. On July 23, 1962, Eastern began a partial operation and resumed full-schedule flight operations on September 13, operating with flight engineers who returned to work and pilot-engineers as replacements for those who did not, under an agreement with ALPA.[71]

A synopsis of this controversy merely touches upon the activities of the unions, the carriers, and various agencies of the Government

[70] Subsequently this restraining order was set aside upon appeal. *Pan American World Air.* v. *Flight Eng. Intern. Assoc.*, 306 F. 2d 840 (2d Cir. 1962).

[71] On July 17 and 18, letters were sent by Eastern to the individual flight engineers offering certain opportunities to return to work. Of 630 flight engineers, 103 returned to work during July and August; the remaining flight engineer positions were filled by pilot-engineers under the agreement with ALPA. This procedure was sustained as not contrary to the Railway Labor Act. *Flight Eng. Intern. Assoc.* v. *Eastern*, 307 F. 2d 510 (2d Cir. 1962), certiorari denied, 83 S. Ct. 934 (1963); *Cf. Flight Engineers' Inter. Ass'n* v. *Eastern Air Lines, Inc.*, 311 F. 2d 745 (2d Cir., 1963); *Flight Engineers' Inter. Ass'n* v. *Trans World Airlines, Inc.*, 205 F. Supp. 137 (D.C., N.Y. 1962).

in their mutual efforts to come to an acceptable and reasonable solution of this particularly troublesome jurisdictional problem.

As highlighted in the Feinsinger Commission report, technological changes in the flight equipment introduced or planned in the airline industry during the last decade, have increased tensions and caused serious problems in the labor-management relations field. While the effect of technological changes has not been confined to the transportation industry, its effect has been particularly severe upon the railroad and airline industries. In the railroad industry, the situation required the creation by the President of a Special Presidential Commission in November 1960, to examine the effect of technological change upon, *inter alia*, the crew complement for train service.[72] This Commission reported to the President in February 1962, but a settlement of the principal issues relating to the displacement of jobs has yet to be found. In the airline industry, technological changes threatened the job security and union representation of a whole class or craft in the industry and resulted in an extremely bitter internecine fight between two strong unions. Regardless of the fact that the carriers undoubtedly had some responsibility for the breeding of the controversy,[73] once the controversy reached the state it did in 1958, the carriers were caught up in a union jurisdictional controversy of an intensity which made the existence or nonexistence of the Mutual Aid Pact between the carriers of little importance as a factor in the labor dispute between the two unions.

On the basis of the record, the unions' *post hoc* argument—that there has been a deterioration in labor-management relations, reflected statistically by an increase in the number of legal and illegal strikes of greater severity and longer duration and by an increase in the number of labor negotiations requiring the attention of the National Mediation Board and the appointment of Presidential Emergency Boards, which has taken place since the Pact was executed and therefore attributable to it—is logically indefensible. The unions, nevertheless, contend that there has been an increase in the extent and depth of industry strife in the airline industry and a steady deterioration in labor-management relations which directly resulted from a hardening of attitudes on the part of the carriers toward the air transport unions. They cite the fact that none of the carriers' principal labor-relations witnesses was able to testify to any substantial improvement in labor relations since the execution of the Pact and that only one witness could testify to even a negligible improvement. Significantly, he attributed this improvement to the carriers which, because of the Pact, have given more careful study to labor problems which has resulted in more careful preparation for negotiation and, in turn, more reasonable bargaining on the part of the unions.

The principal labor witness for the unions, an official of the IAM, expressed the opinion that the Pact has had an overall detrimental effect upon labor relations in the airline industry and a tendency

[72] Special commissions were subsequently created for related maritime activities in the railroad industry, the Railroad Marine Workers Commission, in March 1961, and the Railroad Lighter Captains Commission, in June 1961.

[73] Stated by the Feinsinger Commission to be "their failure to accept managerial responsibilities and their tendencies to temporize and to seek the expedient solution."

to destroy the effectiveness of collective bargaining, due primarily to a hardening of bargaining attitudes on the part of the carriers. He dates this hardening of bargaining attitudes to coincide with the IAM controversy in 1958 and the coincident execution of the Pact. In his opinion, the strikes which occurred during this controversy were unnecessary and due to the failure of the carriers to bargain in good faith for which the Pact was the determinant.

Although not alleging bad faith on the part of Eastern for the refusal to accept the settlement recommended by the Secretary of Labor on July 23, 1962, the unions attribute Eastern's willingness to prolong the strike so as to defeat the flight engineers, to the financial assistance afforded by the agreement. They contend that the decision to take the strike when the other carriers in similar situations did not, as well as the decision to continue the strike after a settlement was offered, was an error in judgment on the part of Eastern's management traceable to the influence of the Pact. They deny the necessity for Eastern to have either taken the strike or to have prolonged it and attribute Eastern's decision to a timely opportunism of Eastern's management whereby it was able to rid itself of the flight engineer problem at the expense of the members of the Pact.[74]

The carriers also credit the existence of the Pact as influential to Eastern's decision to take this strike and to refuse the opportunity to settle. They justify Eastern's decision, in their brief, as a response to prior criticism of management, stating:

> Mutual Aid permitted Eastern to withstand the "irresponsible" strike, and avoid the "tendencies to temporize" and "expedient solution," which the Feinsinger Commission criticized as merely postponing rather than preventing serious strikes * * *.

They also credit both the settlements obtained by the other carriers and the ratification thereof by the FEIA flight engineers, to Eastern's capability to take the strike, stating: "The settlement of FEIA contracts on other vulnerable carriers was undoubtedly influenced by Eastern's refusal to capitulate."

The Bureau joins in the opinion that Eastern's decision to take the strike, as well as to refuse a settlement thereof, was a direct result of the authority of the Pact. But, they infer that Eastern's decision was not solely its own, but represented the Pact members' common position on the issue. In its recommendation that the supplemental payments provision be disapproved on a prospective basis thereby permitting Eastern to retain some $10 million in supplemental payments, the Bureau vindicates this procedure as equitable to the paying Pact members since they "clearly benefited from Eastern's handling of the FEIA dispute."

Apparently, there is a consensus of the parties that the Pact had an influential effect upon the decision of Eastern to take the strike called by the FEIA and to prolong it into a fight to a finish. The carriers imply that the financial assistance of the Pact was the determinant of the decision of Eastern to resist the demands of the

[74] The unions argue that Eastern's position was both financially unwise and unnecessary since, if the proposal of the Secretary had been accepted on July 23, without any mutual aid assistance, Eastern would have been in a sound financial condition, having cash in excess of $13 million and net working capital of approximately $8 million.

FEIA and that its willingness to take a strike and to continue it permitted TWA and Pan American to obtain ratification of their settlements which were pending. The Bureau also adopts a similar position and although the unions don't admit that Eastern's unyielding attitude had any effect on the settlements, they directly accuse Eastern of using the Pact to finance a losing partial operation in order to break the FEIA Chapter on Eastern for its own benefit. It is stated in the unions' brief:

> It is perfectly obvious that the reason for Eastern's action [partial operation after the proposal of the settlement offered on July 28] was that it believed that it had the Flight Engineers licked so that there was no need to settle, particularly when the Pact members could be billed for a substantial part of any losses occurring as a result of limited operations.

Although the circumstances are amenable to speculation, there is no substantial evidence upon which to base a reasonable judgment of the role the Pact had in the decisional process which determined Eastern's course which led to the refusal of the proposed settlement. The only evidence in the record directly on this point is the testimony of J. O. Jarrard, vice president for industrial relations for Eastern. Mr. Jarrard unequivocally stated that the refusal of the settlement was based upon his recommendation to Mr. MacIntyre and that his recommendation was made without any consideration of the financial effects of the Pact. He maintains that he was unfamiliar with the financial aspects of the Pact and that his decision was based solely upon his opinion as a labor-management executive. of the most advisable course to follow in order to advantageously settle a labor dispute which had resulted in a strike. This testimony is uncontroverted by any evidence and the examiner observed no reason to doubt the credibility of this witness.

Due to the obfuscation and uncertainty caused by the magnitude of the crew complement controversy, the record cannot be found determinative that the Pact has had an unequivocal influence upon the decisions of either the carriers or the unions in labor disputes, or has acted as a causative or a deterrent to strikes during the past 4 years. The examiner, nevertheless, is of the opinion that the Pact has had little or no recognizable authority upon the course which labor relations has taken during this period. Even in the case of the recent strikes, there is no substantial evidence to more than suggest that the financial assistance of the Pact was a determinative factor in the decisions of Eastern, and none to indicate that the Pact influenced the manner in which this troublesome controversy evolved. Prior to the calling of the strikes each of the carriers affected by this controversy bargained in good faith with the unions, complying with the mediatory processes of the Railway Labor Act, including the acceptance of proffers of arbitration and recommendations of the Emergency Boards. Additionally, except for the single instance of Eastern's rejection of the recommendation of settlement made by the Secretary of Labor, the Pact members fully cooperated with the Governmental agencies in an attempt to find satisfactory resolutions of the problems. After strikes had been called against Pan American and Eastern, Pan American continued to negotiate in good faith and

a settlement satisfactory to the parties was entered into by both TWA and Pan American without work stoppages occurring. Although Eastern elected to take the strike and rejected the recommendation of the Secretary of Labor of a settlement, which may or may not have disposed of the controversy, there is no evidence in this record that Eastern failed to exercise good faith in its negotiations with the unions or that it was not justified in taking the course which it did.[75]

There is no substantial evidence in the record that the Pact has had any material effect upon the collective bargaining process in the industry. Nor does the record indicate that the Pact has resulted in actions by the Pact members repugnant to the purposes and spirit of the Railway Labor Act.[76]

To recapitulate, the examiner is unable to find on the basis of the record in this proceeding, that the Pact has been a causative factor in producing the labor unrest which has affected the air transportation industry over the past 4 years. As characterized by the Bureau, this period has been atypical and can form no basis upon which to evaluate the effect of the Pact on labor relations under normal conditions. Although it is evident that there has been a deterioration of labor-management relations during this period, the deterioration thereof cannot be attributed to the influence of the Pact.

Although the carriers have urged that the record of labor strife over this period has shown an imbalance of economic power in favor of the unions, affecting the stability and efficiency of the air transportation industry, the examiner does not accept their conclusion.[77] The carriers have not been helpless during this period and, in the opinion of the examiner, could have weathered their labor difficulties without catastrophic results in the absence of mutual assistance. However, the record developed by the carriers relating to the financial vulnerability of a carrier to a strike, as well as the evidence of unrestrained use of the strike power by the unions in the crew complement controversy, is a justification for the adoption of the mutual assistance principle as an economic weapon for use in the collective bargaining process. It is evident that the combination of the carriers for mutual assistance is not rooted in antiunion principles, but has been adopted as a means to accomplish a legitimate business purpose believed advisable by management and not invalid on this score.

The examiner also finds that the record relating to the past operations of the Pact does not substantiate the dire predictions of the unions and the Bureau of future labor unrest, detrimental to the stability of labor-management relations in the industry. Of course, these predictions could well come to pass. Nevertheless, while acknowledging his lack of competency in the labor-management field,

[75] The question of good faith was an issue in litigation between FEIA and Eastern relating to Eastern's method of handling this controversy. The courts' decisions sustain Eastern's actions as not inconsistent with the Railway Labor Act. See note 71 *supra* at 624.

[76] In fact, disregarding negotiations in which the jurisdictional flight crew controversy overrode the economic considerations, the record shows that the carriers have not experienced any difficulty in negotiating contracts with the air transport unions since 1958.

[77] The unions have denied this imbalance, pointing out, inter alia, the disparity between the Pact members and the air transport unions, of total resources and of the strike benefits paid to employees and Pact payments. They also cite the lack of union solidarity which is reflected in the number of "no strike" clauses agreed to by the individual unions and the inactivity of the AATU.

the examiner does not believe that the employees and the unions would act against their own best interests and the interest of the public, to engage in unnecessary labor strife for the purpose of combating a Pact, the efficacy of which they depreciate. It is fervently hoped that labor relations in the air transportation industry, recognized by experts in the field of labor relations to be in an undesirable state, will improve now that the union jurisdictional controversy which generated a large measure of the bitterness and hard feeling between labor and management, has substantially been resolved.

The Bureau has characterized the "supplemental payments agreement" as so effective economically as to constitute a radical imbalance in labor-management relations. In the judgment of the Bureau, the high level of payments guaranteed to a struck carrier will invite labor disputes by encouraging a carrier to take unreasonable bargaining positions or a strike, not only for its own advantage but to present an industry position. It reasons that the limits of insurance chosen by the carriers could have been set at any level and, therefore, the insurance provided for in the agreement must be more than ample to accomplish its ultimate purpose, which the Bureau believes to be the imposition of involuntary joint bargaining on the unions or its accomplishment under the posture of single-carrier negotiation. The unions, while not acknowledging a resulting imbalance and depreciating its effectiveness, have forecast that the approval of the agreement with its expanded economic power, will be counteracted by a strengthening of the unions' position, leading to a lining up of the carriers and unions in opposing groups with combative attitudes.

This thesis of the unions reflects a reluctant admission of the effectiveness of the Pact as an economic weapon in the settlement of labor disputes. Since it diminishes the effectiveness of the unions' strike power, particularly that of the "whipsaw" tactic which the unions have used so advantageously, it is reasonable to expect the unions to organize and develop a strategy counterbalancing or even nullifying its transient effect. It is also foreseeable that in the process, labor disputes will develop which could be extremely detrimental to the public interest. Under these circumstances, although the Board is not interested in the substantive provisions of the agreement as such, it is charged with the duty to examine it to evaluate the correlation between the means adopted and objective to be accomplished. If the means are unreasonable, the arrangement which is in essence an economic pool should be disapproved. The stability of labor-management relations is too important a public interest consideration to be risked by an arrangement between common carriers employing their vast economic power unreasonably. If the method chosen is unreasonably costly to the carriers and indirectly, therefore, harmful to the public, or hurtful to the welfare of their employees, it is manifestly an unreasonable extension of what might otherwise be a valid economic weapon in a labor dispute. As such, although its use would not be in violation of the Railway Labor Act, it would be inconsistent with the development of a sound economic air transportation system responsible to the needs of the public interest and therefore just cause for the Board's intervention in the field of labor-management relations.

While it is theoretically possible for a carrier under the "windfall" provisions of the agreement to receive more in "windfall" receipts than its actual operating expenses during a prolonged strike resulting in a complete cessation of flight operations, the experience during the life of the Pact indicates that this would be unlikely.[78] Similarly, under the supplemental payments provision, the 25 percent of normal daily operating expenses guaranteed to the carrier could exceed the daily operating expense of a struck carrier.

Nevertheless, a consideration of the realities under which the carriers must operate, among other things, the extreme competitiveness of the industry as well as their responsibilities to their stockholders, their employees and the public, would appear to negative the possibility envisioned by the Bureau of a carrier being influenced in taking a strike imprudently. The examiner is disinclined to accept as reasonable the supposition that the mere absence of an immediate financial loss to a carrier would influence a provident management to take a strike, with all its ramifications, when any reasonable resolution of the labor dispute is possible. The consequences of a strike, both tangible and intangible, to an air carrier have been graphically portrayed in the carriers' brief and summarized, *supra*, and it is unnecessary to repeat them here. It is inconceivable to the examiner that any responsible management of an air carrier would unnecessarily invite these consequences, subordinating the carrier's self-interest to the interests of the Pact members, many of which are active competitors.

The record indicates that the guaranteed minimum of 25 percent of the average daily normal air transport operating expense is reasonably related to the expenses which a carrier may be expected to incur during a strike. In the event of a complete shutdown a progressive management might reduce its daily operating expense below this level, but the record indicates that this is unlikely. In addition, there are nonoperating expenses and losses in profits, as well as intangible losses. In the event an attempt to conduct a partial flight operation is made, the experience indicates that the operating expenses for the partial flight operations increase, not in a straight

[78] The carriers have computed, for the period the "windfall" agreements were in effect, the relationship between mutual aid and normal operating expense and the ratio of the actual to the normal operating expense.

Strike	Operations shutdown	Strike days	Percent mutual aid to normal operating expense of operations shutdown	Operating expense percentage of actual to normal
	Percent			
Capital—1958	100	37	26.5	23.73
TWA—1958	100	16	17.3	39.49
Eastern—1958	100	38	3.5	24.97
American—1958–59	100	22	17.9	81.52
Eastern—1960	67	12	13.8	84.37
Northwest—1960–61	33	137	23.6	71.41
American—1961	100	6	15.4	32.77
Eastern—1961	75	8	3.7	67.33
Pan American—1961	70	8	2.6	68.79
TWA—1961	100	7	10.0	56.32

SOURCE: Carriers' joint exhibits 143, 161.

line but disproportionately, conclusively obviating the possibility of making a partial operation financially attractive to management regardless of the 25-percent guarantee provision of the agreement.

Although the supplemental payments provision, even as its liability is diminished by "windfall" payments, appears to be a costly form of insurance for a prudent management of a carrier with stable labor relations to underwrite, no one carrier is immune from labor difficulties and the exercise of management discretion in this respect is not subject to review in this proceeding.[79] The overall effect of the agreement on the Pact members as a group appears minimal, although the effect on profits or losses of individual carriers may be severe. As an insurance arrangement it is economical, in that costs of administration are minimal, with no override such as would be payable in the case of commercial insurance, and no interest payable. Moreover, the carriers have not given a "blank check" to a member carrier to obligate them without limitation for strike losses. The limitation of liability in any one calendar year, based upon one-half of 1 percent of the adjusted air transport operating revenues for the prior calendar year, is keyed to a degree to the ability to pay and is not so large as to cause the paying carrier to get into financial difficulty from this expense alone. On the other hand, the agreement is of use only for brush fires and not holocausts since in the case of a single carrier strike involving one of the larger carriers, the maximum liability would be exhausted in 51 to 85 days, but in the event of simultaneous multicarrier strikes, such as the illegal strike of February 1961, the maximum payments would have been exhausted in 4.8 days.

The examiner's scrutiny of the financial provisions of the agreement does not confirm the Bureau's fear that the agreement financially is of such strength as to create an imbalance in bargaining positions adverse to the public interest objectives. The insurance provision is not attractive enough financially to cause the carriers to refrain from negotiating collective bargaining agreements in good faith or to invite unnecessary strikes for the purpose of presenting an industry position. While admittedly costly, the agreement does not impose a financial burden upon an individual carrier member which would affect its capability to fulfill its obligations under the Act, nor is the liability of the carriers as a group so great as to interfere with the development of a sound economic air transportation industry.

FINDING AND CONDITIONS

On the basis of the entire record, including the findings and conclusions made heretofore in this decision, the examiner finds that the Mutual Aid Pact is not adverse to the public interest but consistent therewith and not in violation of the Act and, therefore, should be approved as conforming to the statutory requirements of section 412(b). As is usual in approving agreements under section 412, the approval shall be subject to certain conditions:

[79] For calendar 1962, American—$2,098,965, Pan American—$2,264,828, TWA—$1,792,944, and United—$2,480,887. (Appendix H.)

1. That it shall not be deemed a determination of the reasonableness of the financial provisions of the agreement for future ratemaking or other regulatory provisions under the Act.
2. That it shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act.
3. That the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Chief of the Board's Office of Carrier Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the agreement as may be reasonably required by the Director of the Bureau of Economic Regulation.
4. That copies of all arbitrators' decisions and awards issued under this agreement shall be filed with the Dockets Section of the Board within 15 days of service thereof on the carrier parties, and that briefs and other documents filed in the arbitration proceeding by carrier parties be made available to the Board for examination upon request.

The Bureau recommended that as a condition for approval the parties should be required to file, within 30 days after an approval of the agreement, a uniform method for determining revenues and added direct expenses incurred by the nonstruck carriers attributable to a strike, for the purpose of determining "windfall" payments under the agreement. In their brief the carriers have stated that the parties have been attempting to establish a uniform method of computing "windfall" payments. They express the belief that a method can be agreed upon but request that this not be required within a specified time. The examiner concurs in the Bureau's judgment that a uniform method of computing "windfall" payments is feasible, but recognizes the difficulty of specifying methods and procedures of common applicability. In dependence upon the carriers' expressed intention of developing and filing a uniform method of procedure for determining "windfall" payments within a reasonable period, the examiner will omit a condition on this subject.

The Bureau also suggested that an approval be limited to a period of 3 years. The statutory provisions of section 412 provide for continuing jurisdiction over an agreement, requiring the Board to disapprove any such agreement, whether previously approved by it, if it finds it to be adverse to the public interest or in violation of the Act. The Board has recognized that its responsibility does not end with its approval and has disapproved agreements, previously approved, when subsequent practices and activities under an agreement have been found adverse to the public interest or in violation of the Act. In view of this plenary power, the examiner believes it unnecessary to limit the duration of the agreement.

The examiner has carefully considered the conditions which the union parties have requested if the agreement is approved, and does not find that these conditions would contribute any substantial benefit to the public interest.

ARBITRATION AGREEMENT

Consolidated in this investigation is an arbitration agreement (CAB 14022) filed October 11, 1960, pursuant to section 412, relating to an arbitration agreed to by the then 10 members of the Pact, concerning a dispute relating to the applicability of the Pact to an illegal strike suffered by Eastern in June 1960. The arbitration has been completed and the opinion and award of the arbitrator was issued December 31, 1960. The arbitrator's opinion has been filed with the Board and payments to Eastern have been made pursuant to the award. On the precedent of the Board's prior approval of a similar arbitration agreement, order E-14693 dated November 30, 1959, 30 C.A.B. 1550, the examiner finds the agreement not adverse to the public interest nor in violation of the Act and should be approved, subject to the usual condition that "the approval granted shall not be deemed a determination of the reasonableness of the financial provisions of the agreement for future ratemaking or other regulatory purposes under the Act."

APPENDIX A

Mutual aid assistance agreements filed with Board

Agreement CAB 12633 filed November 3, 1958

Agreement dated October 20, 1958, for a period of 1 year, between American, Capital, Eastern, Pan American, TWA, and United, providing for "windfall" assistance to a struck carrier in the event of a shutdown of flight operations as a result of a strike (1) to enforce demands in excess of or opposed to recommendations of a Presidential Emergency Board; or (2) called before exhaustion of the procedures of the Railway Labor Act; or (3) otherwise unlawful. Any air carrier holding a certificate of public convenience and necessity may adhere to the agreement. The agreement was approved without an evidentiary hearing, upon oral argument before the Board. (Orders E-13809, May 20, 1959, 29 C.A.B. 168, and E-14563, Oct. 19, 1959, 30 C.A.B. 90.)

Agreement CAB 12633-A filed June 19, 1959

Amendment executed June 5, 1959, conforming agreement CAB 12633 to comply with a condition imposed by the Board deleting clause (2) in entirety (relating to passenger referral by struck carrier to other signatories of the Pact).

Agreement CAB 12633-A1 filed October 23, 1959

Amendment executed October 13, 1959, continuing the Pact for a period of 2 years from October 20, 1958.

Agreement CAB 12633-A2 filed March 22, 1960

Amendment executed March 7, 1960, broadening the scope of the Pact to provide payments to struck carrier members for strikes called in the absence of the establishment of a Presidential Emergency Board and the struck carrier has acted in full compliance with the Railway Labor Act.

Agreement CAB 12633-A3 filed March 22, 1960

Counterpart executed by National March 11, 1960, whereby National became a party to the Pact.

Agreement CAB 12633-A4 filed March 22, 1960

Counterpart executed by Braniff March 14, 1960, whereby Braniff became a party to the Pact.

Agreement CAB 12633–A5 filed March 22, 1960

Counterpart executed by Northwest March 18, 1960, whereby Northwest became a party to the Pact.

Agreement CAB 12633–A6 filed April 7, 1960

Counterpart executed by Continental April 4, 1960, whereby Continental became a party to the Pact.

Agreement CAB 12633–A7 filed October 24, 1960

Amendment executed October 1, 1960, continuing the Pact in effect until December 31, 1961, and thereafter from year to year. A provision was added permitting withdrawal from the Pact, effective December 31 of any year after 1960, upon at least 60 days' written notice prior thereto, which in turn permits any other party to withdraw, effective the same date, upon 30 days' written notice.

Agreement CAB 12633–A8 filed March 26, 1962

Amendment executed March 22, 1962, effective as of December 31, 1961, between American, Braniff, Continental, Eastern, Northwest, Pan American, TWA, and United, extending the coverage of the Pact to a shutdown of flight operations resulting from a strike after a Presidential Emergency Board has made its report without specific recommendations on the merits of the dispute.

The financial provisions were enlarged to provide a minimum payment of 25 percent of a struck carrier's normal air transport operating expenses for the operations shut down regardless of "windfall" payments which it may receive. A contributing carrier's liability for supplemental payments during any year is limited to one-half of 1 percent of its air transport operating revenue for the previous calendar year. In the event of multiple strikes in any year resulting in the exhaustion of the liability for supplemental payments, provision is made for a redistribution of the supplemental payments among the struck carriers.

Arbitration of disputes relating to payments is provided for; and adherence to the Pact is limited to trunk air carriers. Adherence by trunk carriers not parties to the Pact previously may be on 6 months' notice, or, in the alternative, by making the net payments required as a member after December 31, 1961. A carrier who was a member prior to December 31, 1961, may readhere only by making the payments provided in the alternative provision.

Withdrawal of a carrier is permitted from year to year as of December 31 on written notice, but it remains liable for all payments under the agreement for a period of 1 year thereafter, limited however to the net excess supplemental payments received by it while a member.

Agreement CAB 13454 filed August 17, 1959 [arbitration agreement]

Agreement executed July 6, 1959, providing for the arbitration of a dispute relating to the coverage of the Pact to a strike on American by ALPA in December 1958 and January 1959. This agreement was approved by the Board (orders E–14093, Nov. 30, 1959, 30 C.A.B. 1550, and E–14897, Feb. 3, 1960, 30 C.A.B. 1548.) Opinion and award of Arbitrator Bruce Bromley issued January 20, 1960.

Agreement CAB 14622 filed October 11, 1960 [arbitration agreement]

Agreement executed September 14, 1960, providing for the arbitration of a dispute relating to the coverage of the Pact to a partial strike by ALPA on Eastern in June 1960. This agreement was consolidated in the investigation by the Board (orders E–16081, Nov. 29, 1960, and E–16821, May 17, 1961). Opinion and award of Arbitrator Bruce Bromley issued December 31, 1960.

Appendix B

Board orders issued in Mutual Aid Pact

A—Current investigation:

Order E–15413 dated June 20, 1960

Order instituting an investigation of the Pact (agreements CAB 12633–A–A6) making American, Capital, Eastern, Pan American, TWA, United, Braniff,

Continental, National, and Northwest, carrier parties; and ALPA, ALDA, BRC, FEIA, IAM, TWU, and UAW, union parties.

It was ordered—

1. That an investigation be and hereby is instituted, pursuant to the provisions of sections 204(a), 407, 412, and 1002(b) of the Act, to determine whether the Pact, as amended, is consistent with the public interest and not in violation of the Act;

The scope of the investigation was delineated by the Board as follows:

In view of these circumstances, the Board desires to examine in detail the expanded Pact and the operating experience gained under the previous Pact. In its original order of approval, the Board noted that it did not have before it an evidentiary record against which to test various contentions of the parties regarding the legality and desirability of the agreement itself and of operations under it. The investigation ordered herein will furnish a vehicle for complete examination of the issues previously considered by the Board, together with such new matters as may be raised by developments in the interim. It will also aid in determining to what extent the carriers are developing long-term mutual labor-relations arrangements, and the possible impact of these arrangements on industry employment, stability, and related matters which it is the Board's duty to consider in weighing whether the agreements are consistent with the public interest. [Footnote omitted.]

Order E-16081 dated November 29, 1960

Order consolidating an amendment (CAB 12633-A7) filed October 24, 1960, and an arbitration agreement (CAB 14622) filed October 11, 1960, relating to a dispute regarding the coverage of the Pact. It provided for future consolidation without further order of all amendments filed prior to the closing of the record.

Order E-16821 dated May 17, 1961

Denying Eastern's petition for reconsideration of order E-16081.

Order E-16598 dated March 31, 1961

Order denying bureau counsel's appeal of examiner's decision striking as an issue from the investigation the proposed issue relating to "What mutual labor-relations arrangements, other than the Pact itself, are developing in the industry?"

B—Prior to investigation:

Order E-13233 dated December 4, 1958, 28 C.A.B. 964

Order finding that original six-carrier agreement (CAB 12633) effective October 20, 1958, for a period of 1 year, filed with the Board November 3, 1958, is an agreement "among air carriers affecting air transportation for, among other things, pooling or apportioning earnings, losses and traffic, and for other cooperative working arrangements" required to be filed pursuant to section 412(a) of the Act and setting the issue of approval under section 412(b) for oral argument before the Board on January 14, 1959.

Order E-13308 dated December 22, 1958, 28 C.A.B. 966

Order requiring the filing of additional information by carrier parties to that previously required in E-13233, including information relating to strikes in progress.

Order E-13899 dated May 20, 1959, 29 C.A.B. 168

Opinion and order approving the Pact with a condition that clause 2, relating to preferred routing of traffic to other signatories of the Pact, be deleted. Member Minetti *dissenting*. The opinion found that the Pact, as conditioned, is not adverse to the public interest and not in violation of the Act; but that reporting provisions were required in order to scrutinize the operations under the Pact. The opinion limited the Board's approval so as not to affect any of the rights and obligations of the carriers or their employees under the

Railway Labor Act, and to assure that its finding would not be deemed a determination of the reasonableness of the financial provisions of the agreement for future ratemaking or for other regulatory purposes under the Act.

Order E-14563 dated October 19, 1959, 30 C.A.B. 90

Order denying reconsideration with a supplemental opinion on the merits, Member Minetti dissenting. While recognizing the substantial impact of the Pact upon labor, management, and the public, the opinion sustained the discretion of the Board to proceed upon oral argument. It was found that section 412 does not require an evidentiary hearing, and a hearing was not requested. The Board was not required to order a hearing on its own initiative and the Board did not abuse its discretion in not ordering a hearing under all the circumstances, including the parties' requests for prompt disposal and the opportunities provided to submit documentary material. The Board further found that on the petition for reconsideration requesting a hearing, the objectors had failed "to spell out any specific factual matters which they expect to prove after evidentiary exploration."

The Board also rejected the contention that it had erred by improperly construing section 412(b) as requiring only a negative finding that an agreement is not adverse to the public interest, stating "we did not reach our conclusion until satisfied that the agreement would be unprejudicial to the public interest."

Order E-14693 dated November 30, 1959, 30 C.A.B. 1548

Order approving an agreement for arbitration of a dispute relating to the Pact coverage of a strike by ALPA on American in December 1958 and January 1959.

Order E-14897 dated February 3, 1960, 30 C.A.B. 1548

Order granting partial reconsideration of order E-14693, 30 C.A.B. 1548, insofar as the order required the filing with the Board of copies of all documents in the arbitration proceeding. Recognizing the advantage of privacy in arbitration proceedings the Board limited the filing requirement to the arbitrator's decision.

APPENDIX C

[Basic Agreement]

Mutual Aid Agreement as approved by CAB order E-13899 dated May 20, 1959

AGREEMENT dated as of October 20, 1958, between AMERICAN AIRLINES, INC., CAPITAL AIRLINES, INC., EASTERN AIR LINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC., and UNITED AIR LINES, INC.

WITNESSETH:

WHEREAS, the parties are common carriers holding certificates of public convenience and necessity issued by the Civil Aeronautics Board (hereinafter called CAB) providing for the transportation by air of persons, property and mail; and

WHEREAS, the mutual interests of the parties call for the taking of all proper and lawful measures to bring about sound and reasonable economic conditions that will be of benefit to the air transport industry and to the public; and

WHEREAS, the parties and other airlines are facing or faced with the threat of extreme and unreasonable demands made by representatives of certain of the classes and crafts of their employees, as exemplified by the current dispute between certain of the parties and their maintenance and related employees, represented for the purpose of collective bargaining by the International Association of Machinists, AFL/CIO (hereinafter called IAM), a controversy in which IAM has rejected and shown an utter disregard for the recommendations of the Emergency Board 122 appointed by the President of the United States to investigate said dispute and has struck Capital Airlines and threatened to strike other carriers for their insistence upon substantial compliance with the terms of said recommendations, which action of the IAM tends to undermine the influence, position and integrity of such Board and is destructive of the collective bargaining process; and

WHEREAS, it is in the public interest and the interest of the parties hereto that the recommendations of such Presidential Emergency Board created under the provisions of the Railway Labor Act be respected by the employers and employees whose dispute was heard by the Board;

NOW, THEREFORE, the parties hereby agree:

1. In the event any party suffers a strike, resulting in the shutdown of its flight operations, which has been called for reasons which include the enforcement of demands in excess of or opposed to the recommendations of a board established by the President of the United States under section 10 of the Railway Labor Act and applicable to such party; or which has been called before the employees on strike shall have exhausted the procedures of the Railway Labor Act or which is otherwise unlawful; then, in such event, each party will pay over to the party suffering the strike an amount equal to its increased revenues attributable to the strike during the term thereof, less applicable added direct expenses. Payments shall be made monthly within 10 days after the close of each calendar month or at such more frequent intervals as may be agreed to by the parties.

2. Any other air carrier holding a certificate of public convenience and necessity issued by the CAB may become a party to this agreement by signing counterpart copies thereof, forwarding copies to each of the other parties and to the CAB for filing.

3. This agreement shall become effective immediately and shall be filed with the CAB. If this agreement shall be disapproved by the CAB, it shall terminate forthwith to the extent disapproved, and payments made hereunder, to the extent that they are affected by the terms of such disapproval, shall become and be treated as an obligation to and owing from the party suffering the strike to the paying party. This agreement shall continue in effect for a period of one year from the date hereof.

IN WITNESS WHEREOF, the parties have signed this agreement as of the date first above written.

AMERICAN AIRLINES, INC.
CAPITAL AIRLINES, INC.
EASTERN AIR LINES, INC.
PAN AMERICAN WORLD AIRWAYS, INC.
TRANS WORLD AIRLINES, INC.
UNITED AIR LINES, INC.

APPENDIX D

[*Expanded Agreement*]

Mutual Aid Agreement as Amended to December 31, 1961[1]

NOW, THEREFORE, the parties hereby agree:

1. In the event any party suffers a strike, resulting in the shutdown of its flight operations, which has been called for reasons which include the enforcement of demands in excess of or opposed to the recommendations of a board established by the President of the United States under section 10 of the Railway Labor Act and applicable to such party; *or which has been called in the absence of the establishment of such a board and the struck party has in all respects acted in compliance with the Railway Labor Act;*[2] or which has been called before the employees on strike shall have exhausted the procedures of the Railway Labor Act or which is otherwise unlawful; then, in such event, each party will pay over to the party suffering the strike an amount equal to its increased revenues attributable to the strike during the term thereof, less applicable added direct expenses. Payments shall be made monthly within 10 days after the close of each calendar month or at such more frequent intervals as may be agreed to by the parties.

2. Any other air carrier holding a certificate of public convenience and necessity issued by the CAB may become a party to this agreement by signing counterpart copies thereof, forwarding copies to each of the other parties and to the CAB for filing.

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[1] "Whereas" clauses as in basic agreement.

[2] Italicized material in clause 1 indicates substantive changes incorporated by amendment of March 7, 1960, and italicized material in clause 3 by amendment of October 1, 1960.

8. This agreement shall become effective immediately and shall be filed with the CAB. If this agreement shall be disapproved by the CAB, it shall terminate forthwith to the extent disapproved, and payments made thereunder, to the extent that they are affected by the terms of such disapproval, shall become and be treated as an obligation to and owing from the party suffering the strike to the paying party. *This agreement shall continue in effect until December 31, 1961 and thereafter from year to year, but any party may withdraw effective as of December 31 of any year after 1960 by giving at least sixty (60) days written notice to the other parties and the CAB. Upon such withdrawal by any party, any other party may also withdraw effective as of December 31 of the same year by giving at least thirty (30) days written notice to the other parties and the CAB. In addition, Braniff Airways, Inc., Continental Air Lines, Inc., National Airlines, Inc., and Northwest Airlines, Inc., have reserved the right to withdraw as provided in the amendment to this agreement dated as of March 7, 1960.*

IN WITNESS WHEREOF, the parties have signed this agreement as of the date first above written.

AMERICAN AIRLINES, INC.
CAPITAL AIRLINES, INC.[3]
EASTERN AIR LINES, INC.
PAN AMERICAN WORLD AIRWAYS, INC.
TRANS WORLD AIRLINES, INC.
UNITED AIR LINES, INC.
BRANIFF AIRWAYS, INC.[4]
CONTINENTAL AIR LINES, INC.[5]
NATIONAL AIRLINES, INC.[6]
NORTHWEST AIRLINES, INC.[7]

[3] Merged with United—June 1, 1961.
[4] Braniff adhered Mar. 14, 1960.
[5] Continental adhered Apr. 4, 1960.
[6] National adhered Mar. 11, 1960.
[7] Northwest adhered Mar. 18, 1960.

APPENDIX E

[*Supplemental Payments Agreement*]

Amendment dated as of December 31, 1961, to the Mutual Aid Agreement Executed March 22, 1962, and Filed March 26, 1962 [1]

WITNESSETH:

WHEREAS, the undersigned desire to amend the utual aid agreement dated October 20, 1958, as amended from time to th which agreement as amended is hereinafter referred to as the "Agreement";

NOW, THEREFORE, the undersigned hereby agree:

1

1. Clause 1 of the Agreement is amended in its ent :v to read as follows:

(A) In the event any party suffers a strike, resi .ig in the shutdown of its flight operations, (i) which has been called for asons which include the enforcement of demands in excess of or opposed to the recommendations of a board established by the President of the United States under section 10 of the Railway Labor Act and applicable to such party; or (ii) which has been called in the absence of the establishment of such a board or in case of the failure of such a board to make specific recommendations on the merits for the settlement of the issues in dispute, and the struck party has in all respects acted in compliance with the Railway Labor Act; or (iii) which has been called before the employees on strike shall have exhausted the procedures of the Railway Labor Act; or (iv) which is otherwise unlawful; then, in such event, each party will pay over to the party suffering the strike an amount equal to its increased revenues attributable to the strike during the term thereof, less applicable added direct expenses.

(B) A struck party (subject to the limitations prescribed below) shall be entitled to additional payments if the payments received under (A) are less than twenty-five percent of its normal air transport operating

[1] This amendment replaces all of the substantive provisions of the prior agreements.

expenses for the flight operations shut down as a result of the strike (the amount produced by such twenty-five percent being hereinafter called the "standard amount"), such additional payments to be determined as follows:

(1) In the event the payments to a struck party under (A) shall be less than the standard amount, the other parties (whether or not they are obligated to make payments under (A)) shall make such additional payments to the struck party as may be necessary to bring the aggregate of the payments under (A) and (B) up to the standard amount, subject to the limitations contained in paragraphs (2) and (3) below.

(2) The additional payments required of each party under paragraph (1) above shall be in the proportion that such party's air transport operating revenue for the calendar year next prior to the year in which the strike occurs bears to the total of such revenue for all paying carriers, but no party shall be obligated to make additional payments with respect to any calendar year which exceed, in the aggregate, one-half of one percent of such party's air transport operating revenue for such prior calendar year.

(3) In any calendar year in which there are two or more struck parties entitled to payments under (B) and the limitation contained in paragraph (2) shall prevent any of such struck parties from receiving the standard amount, the aggregate amount of all additional payments for such year under (B) shall be redistributed between the struck parties on the basis described below. There shall be no redistribution of payments under (A).

The redistribution of additional payments under (B) shall be with the object that, to the extent possible, no one of the struck parties shall receive from the total of payments under (A) and (B) a lower percentage of the standard amount than is received by any of the other struck parties except when a lower percentage of the standard amount results from the principle that there will be no redistribution of payments under (A).

An example of redistribution of payments under (B) is set forth in Appendix I attached hereto.

(4) The redistribution referred to in paragraph (3) shall be made promptly from time to time whenever it appears that a party which has already received payments under (B) will attain a higher percentage of the standard amount than it will be entitled to thereunder.

(C) All strike payments shall be made monthly within ten days after the close of each calendar month, or at such more frequent intervals as may be agreed to by the parties, upon the basis of preliminary estimates subject to subsequent adjustment.

(D) For the purposes of the Agreement:

(1) A struck party's normal air transport operating expenses for each day for any operation shall be its average daily air transport operating expenses for such operation includable in Accounts 5100–7000 under the CAB's Uniform System of Accounts and Reports for twelve months of full operations immediately preceding the month in which the strike shall have started, excluding added direct expenses applicable to increased revenues attributable to a strike as described in (A) above. A month in which a party's normal operations have for any reason been curtailed to an extent that substantially affects its air transport operating expenses shall not be regarded as a month of full operations.

(2) A party's air transport operating revenue shall include all payments such party has received under the Agreement, but shall not include the increased revenues attributable to any strike with respect to which such party shall have made payments under the Agreement.

(E) In the event of a dispute regarding the requirement to make or the right to receive payment, the dispute shall be referred to final and binding arbitration. Unless the parties involved otherwise agree within twenty days after receipt of the notice and demand for arbitration, the arbitrator

shall be selected and the arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Judgment upon any award rendered hereunder may be entered in any court having jurisdiction.

2. Clause 2 of the agreement is amended in its entirety to read as follows:

Any other trunk air carrier holding a certificate of public convenience and necessity issued by the CAB may become a party to the Agreement by signing counterpart copies and forwarding such copies to each of the other parties and to the CAB for filing. Any such carrier which elects to become a party after March 15, 1962, however, shall be liable for all payments it would have had to make if it had been a party on and after January 1, 1962, less all payments which it would have been entitled to receive with respect to such period, and the payments by other parties under Clause 1(B) above shall be recomputed accordingly; provided, however, that any such carrier that was not a party to this agreement at any time prior to January 1, 1962 may elect to become a party as provided above, or upon giving six months' notice to the other parties to the agreement and the Civil Aeronautics Board of its desire to become a party at the end of said six months, in which event no payments will be due to or from such joining carrier until the end of said six months, and it signs counterpart copies of this agreement for all the parties and files it with the Civil Aeronautics Board.

Other than as set off against its liability upon becoming a party as stated above, such carrier shall not be entitled to payments which it would have received had it been a party to the Agreement.

3. Clause 3 of the Agreement is amended in its entirety to read as follows:

This Agreement shall become effective immediately, shall be filed with the CAB, and shall continue in effect until December 31, 1962 and thereafter from year to year, but any party may withdraw effective as of December 31, 1962 or December 31 of any year thereafter by giving at least sixty days' written notice to the other parties and the CAB. Upon such withdrawal by any party, any other party may also withdraw effective as of December 31 of the same year by giving at least thirty days' written notice to the other parties and the CAB. A party that withdraws from the Agreement (at a time two or more other carriers continue) shall nevertheless thereafter remain obligated, for a period of twelve months following the month in which such withdrawal becomes effective, to make the payments required by the Agreement to the extent that such withdrawing party, on or after January 1, 1962, has received the amounts under Clause 1(B) above in excess of payments made by such party under such Clause 1(B).

II

This amendment shall become effective immediately and shall be filed with the CAB. If this amendment shall be disapproved by the CAB, it shall terminate forthwith to the extent disapproved, and payments made hereunder, to the extent that they are affected by the terms of such disapproval, shall become and be treated as obligations owing from the receiving party to the paying party.

Any party may withdraw from the Agreement in the event the CAB disapproves the Agreement in whole or in part, by so notifying each of the other parties and the CAB, within ten days after such disapproval.

Withdrawal under the preceding paragraph shall be subject to the conditions prescribed in the final sentence of Clause 3 of the Agreement.

IN WITNESS WHEREOF, the parties have signed this agreement as of the date first above written.

AMERICAN AIRLINES, INC.
BRANIFF AIRWAYS, INC.
CONTINENTAL AIR LINES, INC.
EASTERN AIR LINES, INC.
NORTHWEST AIRLINES, INC.
PAN AMERICAN WORLD AIRWAYS, INC.
TRANS WORLD AIRLINES, INC.
UNITED AIR LINES, INC.

APPENDIX E—Continued

[In thousands]

Carrier	Standard amount	Payments under (A)	Additional payments under (B)	Total of (A) and (B)		Additional payments as redistributed	Revised total of (A) and (B)	
				Amount	Percent of standard amount		Amount	Percent of standard amount
A	$5,000	$4,800	$200	$5,000	100	0	$4,800	96
B	6,000	4,000	2,000	6,000	100	$1,386	5,386	89.5
C	2,000	2,000	1,000	3,000	150	654	2,654	89.5
D	10,000	1,000	[1] 6,800	7,800	78	7,948	8,948	89.5
Total	24,000	11,800	10,000	21,800	----------	10,000	21,800	----------

[1] Maximum amount payable under paragraph 2 is exhausted.

NOTE:
(a) Assume maximum amount payable under (B) is $10 million because of limitation contained in paragraph 2.
(b) Assume one struck carrier receives virtually all of standard amount from payments under (A).

APPENDIX F

Excerpts of statutory provisions

Federal Aviation Act of 1958 **[*49 U.S.C. 1301–1542*]**

Sec. 102. [49 U.S.C. 1302]

In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

* * * * * * *

Sec. 401. [49 U.S.C. 1371]

* * * * * * *

(k) (4) It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.

* * * * * * *

Sec. 406. [49 U.S.C. 1376]

* * * * * * *

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, (1) the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; (2) such standards respecting the character and quality of service to be rendered

by air carriers as may be prescribed by or pursuant to law; and (3) the need of each such air carrier (other than a supplemental air carrier) for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

* * * * * * *

Sec. 412. [49 U.S.C. 1382]:

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

Railway Labor Act [45 U.S.C. 151–163, 181–188]

Sec. 2 [45 U.S.C. 151a, 152]:

The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

First. It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

* * * * * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representatives of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * * * * * *

Sec. 10. [45 U.S.C. 160]:

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a Board to investigate and report respecting such dispute. * * * Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereof to the President within thirty days from the date of its creation.

* * * * * * *

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

Sec. 201. [45 U.S.C. 181]:

All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

APPENDIX G

SUMMARY OF MUTUAL AID PAYMENTS [1]

October 1958 to Jan. 1, 1968

[In thousands]

Received by—	Total received	Paid by—									
		AAL	BNF	CAP	CAL	EAL	NAL	NWA	PAA	TWA	UAL
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
American	$4,431	------	$169	$353	$41	------	------	------	------	$1,260	$2,608
Braniff	(2)	------	------	------	------	(2)	------	------	------	------	------
Capital	2,620	$908	------	------	------	$301	------	------	------	419	992
Continental	------	------	------	------	------	------	------	------	------	------	------
Eastern	2,209	306	66	714	2	------	$411	$116	$328	183	83
National	107	4	1	26	------	74	------	------	------	1	1
Northwest	3,601	177	------	796	------	115	------	------	650	43	1,820
Pan American	121	------	7	------	------	------	------	------	------	------	114
TWA	3,071	727	25	195	44	1	------	------	319	------	1,760
United	------	------	------	------	------	------	------	------	------	------	------
Total	16,160	2,122	268	2,084	87	491	411	116	1,297	1,906	7,378

[1] Under "windfall" agreements.
[2] Payment less than $500.

SOURCE: Joint exhibit No. 4 and reports of carriers filed with Board.

APPENDIX H

Comparison of mutual aid payments with net income as reported by carriers for calendar 1962, based on final fourth quarter reports

Carrier	Mutual aid payments [1]			Reported net income (loss)	Mutual aid as percent of reported net income (loss)	
	Part A [2]	Part B [2]	Total		Part A	Total
Receiving: Eastern	$6,066,212	$9,945,307	$16,014,517	$(13,349,500)	(46)	(120)
Paying:						
American	1,060,570	2,098,965	3,159,535	9,527,371	11	33
Braniff	118,111	446,207	564,319	2,424,677	5	23
Continental	------	312,000	312,000	1,779,400	------	18
Northwest	307,649	550,753	858,402	7,230,392	4	12
Pan American	1,023,000	2,264,828	3,287,828	15,007,223	7	22
Trans World	169,691	1,792,044	1,961,735	(5,696,777)	(3)	(35)
United	3,391,696	2,480,867	5,872,563	7,729,150	44	76
Total paying	6,070,717	9,945,665	16,016,402	38,013,445	16	42

[1] There are slight differences between the totals of the amounts which the paying carriers report having paid Eastern and the amounts Eastern reports having received.
[2] Part A represents "windfall," and part B represents supplemental payments under the agreements.

40 C.A.B.—579

APPENDIX F

Mutual Aid Agreement Between American and Mohawk Airlines

Order E-24213 (1966)

Opinion of the Board

Opinion of Member Gillilland, dissenting

DOCKET 13781
(E-24218)

MUTUAL AID AGREEMENT BETWEEN AMERICAN AIRLINES AND MOHAWK AIRLINES

Decided September 23, 1966

Mutual Aid Agreement between American Airlines and Mohawk Airlines found to be adverse to the public interest and is disapproved.

APPEARANCES:

Arthur M. Wiseheart on behalf of American Airlines, Inc.
John R. Carver on behalf of Mohawk Airlines, Inc.
Martin C. Seham on behalf of Allied Pilots Association.
Edward J. Hickey, Jr., James L. Highsaw, Jr., and *William J. Hickey* on behalf of Union Parties.

OPINION

BY THE BOARD:

Pursuant to section 412 of the Act, American Airlines and Mohawk Airlines have requested Board approval of a mutual aid agreement between them. The agreement provides that in the event either party suffers a shutdown of operations caused by specified types of strikes, the other party will pay to the struck party an amount equal to its increase revenues attributable to the strike less applicable added direct expenses. The agreement is substantially similar to the Trunkline Mutual Aid Pact approved by the Board in 1964.[1] However, as the Board has noted in approving the latter, no serious consideration was given to the extension of the Pact to include a subsidized carrier or carriers.[2] For this reason, the Board concluded that it was desirable that it be afforded the benefit of the views of interested parties as to the public interest considerations bearing on a mutual aid pact involving a subsidized carrier.[3] To this end the Board has invited and received briefs and has heard oral argument.[4]

The Board has fully considered the contentions of the parties in the light of the record. Upon such consideration the Board concludes that the American-Mohawk agreement should be disapproved, since we find it to be adverse to the public interest.

At the outset we reject Mohawk's claim that the ultimate question for resolution is whether it is "honest, economical, and efficient

[1] *Mutual Aid Pact Investigation*, 40 C.A.B. 559 (1964). (One significant difference in the provisions of the two agreements is that, unlike the Trunkline Mutual Aid Pact, the American-Mohawk agreement does not provide for a guaranteed minimum level of receipts for the struck carrier measured in terms of estimated operating expenses.)

[2] Order E-22322, June 16, 1965. (No subsidized carrier was a member of the pact and it was restricted to trunk carriers.)

[3] Ibid.

[4] In addition to the carrier parties to the agreement, briefs and oral argument have been submitted by Union Parties (The Air Line Pilots Association, International; Air Line Dispatchers' Association; Brotherhood of Railway and Steamship Clerks; Flight Engineers' International Association; International Association of Machinists; and Transport Workers Union) and the Allied Pilots Association.

management" for Mohawk to enter into the agreement. It may very well be the case that the agreement represents a provident effort on Mohawk's part to protect itself from strike losses. The criterion of secetion 412 of the Act, however, is not that of section 406, but instead encompasses the broad test of public interest. In the Trunkline Mutual Aid Pact which the Board approved as not being adverse to the public interest, the parties were unsubsidized trunkline carriers which alone would bear the costs of the protection offered. The situation here is significantly different. Mohawk is a subsidized regional carrier, and there is a substantial risk that the costs of the protection offered Mohawk under the agreement will be borne by public funds in the form of increased subsidy payments to Mohawk. Since there is a real prospect that Mohawk's subsidy will be increased by reason of its participation in the agreement and we can find no offsetting public benefits justifying such a possible increase on subsidy burden, we conclude that the agreement is adverse to the public interest.

On its face, an agreement which involves the contingency of indirect use of subsidy for strike protection of a carrier gives concern. This contingency is present here since, as Mohawk concedes, in the event American is struck and the former were on an open-rate period for any portion of the strike period, payments to American would increase Mohawk's subsidy need, assuming that this expense meets the standards of section 406 of the Act. Moreover, Mohawk concedes that if it remained on a closed subsidy mail rate which included profit-sharing provisions as does the present class rate, and if it were in a profit-sharing situation for the calendar year during the period that American was struck, the agreement would reduce Mohawk's obligation to the Board to share excess profits, as these excess profits would be reduced.

Mohawk contends that payments by it to American, generated by traffic carried only because American had been struck, do not flow from subsidy payments to Mohawk. However, in the absence of the agreement, Mohawk could clearly be the beneficiary of revenues from additional traffic carried by it resulting from a strike on American, and the amount of its subsidy would thereby be reduced.

It is also contended by Mohawk that the agreement involves a "two-way street" since, if Mohawk is struck, it would receive windfall payments from American resulting in a decrease in subsidy payments. We cannot find, however, that the prospects for subsidy reduction are equal to the prospects of additional subsidy burden. Even if it is assumed that the risk of strike is equal between the parties and even if the amount paid to Mohawk equaled the amount paid to American under the agreement, it appears probable that there would be a net loss to the Government. Mohawk is now, and for some time has been, in a profit-sharing bracket under the class rate.[5] It can

[5]Where a carrier's annual earnings (after applicable income taxes) exceed its weighted average differentiated rate of return, the carrier is obligated to refund a portion of its profits, to the extent indicated in the table below, to the Board as subsidy not due the carrier:

Rate of return after taxes (percent)	Percentage of profits refunded by carrier
0 to D [6]	0
D to 13.5	50
Over 13.5	75

[6] D represents the fair and reasonable differentiated rate of return, not to exceed a maximum of 11 percent, and not less than a minimum of 9 percent (order E23880, June 23, 1966, 44 C.A.B. 637).

be anticipated that the carrier's earnings would reach the 75-percent profit-sharing bracket in the event of a strike on American, its major trunkline competitor. Thus, in the event of an American strike, payments to the latter would indirectly be underwritten by subsidy to the extent of 75 percent. If Mohawk were struck however, payments to it by American probably would not be shared to this extent by the Board, since a strike would undoubtedly reduce Mohawk's rate of return and in all likelihood would place the carrier in a bracket in which it would be obligated to refund only 50 percent of its profits or nothing at all.

In view of the above, we find that there is a substantial prospect that Mohawk's subsidy requirement will be increased through its participation in the agreement. We find no public benefits which would justify such a risk. We conclude therefore that it is not in the public interest to approve the agreement. Our findings and conclusions herein, however, are without prejudice in the event American and Mohawk should submit a revised agreement containing provisions assuring against any possible subsidy burden through Mohawk's participation.

We have duly considered all contentions made by the parties and, except to the extent indicated above, find that they do not alter our decision herein.

Accordingly, in view of the foregoing and all the facts of record, we find that the mutual aid agreement between American Airlines and Mohawk Airlines is adverse to the public interest and should be disapproved.

An appropriate order will be entered.

Murphy, Chairman, Murphy, Vice Chairman, Minetti and Adams, Members, concurred in the above opinion. Gillilland, Member, filed the following dissent.

GILLILLAND, *Member*, dissenting:

In approving the Mutual Aid Pact now in force between a number of the trunkline carriers (*Mutual Aid Pact Investigation*, 40 C.A.B. 559, 561 (1964)), the Board said:

> Air Carriers are particularly vulnerable to strikes, and the industry has, in the recent past, been plagued by strikes. The Pact offers, at a not unreasonable cost for the protection obtained, a substantial measure of relief against the costs of strikes, in this fashion and to this extent contributing to industry's stability.

I do not understand that the Board now intends to withdraw from that doctrine although it would seem as pertinent to the needs of the small carriers as to the large ones. Rather it seeks to distinguish on the ground that this Pact might prove a hazard to the subsidy burden. As subsidy eligibility is dependent upon economic status which may change from time to time the same possibility exists as to the trunk carriers. That it may be greater in the case of the small carriers than of the large ones does not create a legal difference.

The Board refused to withhold approval because of the bare existence of such a possibility in the *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168 (1959). To the extent that the matter might be influenced by the so-called profit-sharing provisions of the class rate it is to be borne in mind that the class rate is not a statutory provision but a Board regulation for measuring subsidy which is subject to revision as need be.

ORDER

The Board, having considered briefs and heard oral argument in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED, That agreement CAB 16488 be and it hereby is disapproved.

APPENDIX G

Airlines Mutual Aid Agreement (Renewal)
Order Instituting Investigation
Order E-26000 (1967)

Airlines Mutual Aid Agreement (Renewal)

Order E-26000

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 17th day of November, 1967

Docket 9977

Agreements CAB 12633A-A8

ORDER INSTITUTING INVESTIGATION

By application filed on May 2, 1967, the air carrier parties to the Mutual Aid Agreement (Pact)[1] requested that the Board, without further proceedings, pursuant to section 412 of the Federal Aviation Act of 1958 as amended (the Act), renew its approval of the Pact for an indefinite period. By Order E-21044, July 10, 1964, the Pact was approved for a period of three years. On June 14, 1967, joint objections to the application were filed by five employee organizations[2] and separate objections were filed by Air Line

[1] American Airlines, Inc. (American); Braniff Airways, Inc. (Braniff); Eastern Air Lines, Inc. (Eastern); Northwest Airlines, Inc. (Northwest); Pan American World Airways, Inc. (Pan American); Trans World Airlines, Inc. (TWA); and United Air Lines, Inc. (United).

[2] Air Line Dispatchers Association (ALDA); Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (BRC); Flight Engineers International Association (FEIA); International Association of Machinists and Aerospace Workers (IAM); and Transport Workers Union of America (TWU).

Pilots Association, International (ALPA). Objections were filed by Allied Pilots Association (APA), representing American's pilots, on June 21, 1967. All of the objecting parties requested that the Board deny the application for renewal of the Board's approval of the Pact. Alternatively, all of these parties, except APA, requested that the matter be set down for public hearing, while APA requested that American's participation in the Pact be terminated. The air carriers filed a reply to the several objections on August 21, 1967.

In support of their objections the unions allege, in effect, that new questions of fact and policy are posed by the renewal application. The unions state that, in light of developments relating to air carrier-union relations since the matter last came before the Board, the Board should reexamine the Pact; that the future of the institution of collective bargaining in the air transportation industry is likely to be directly affected by the disposition made in this proceeding; and that the occurrence of the IAM five-carrier strike of 1966, alone justifies a complete reexamination of the Pact. In addition, APA contends that, as an independent union, it would be unduly disadvantaged in its dealings with American, since the carrier is a party to multi-carrier bargaining arrangements which are fostered by the Pact.

In their joint response to the unions' objections, the carrier parties state that there are no new facts or changed circumstances since the Board's approval of the Pact in 1964, to show that the Pact has in any way operated in a manner inconsistent with the public interest. The carriers state, *inter alia*, that the unions' contentions are the same as previously presented and rejected by a majority of the Board, and that the Pact played no part in the 1966 IAM strike.

Airlines Mutual Aid Agreement (Renewal)
Order No. E-26000

The Board has carefully examined the controverted allegations contained in the pleadings and has determined that the most appropriate action to follow is the institution of a formal investigation. The matters presented pose serious and complex factual and policy issues. On the present record it appears that various disputed questions of fact are present. It is also apparent from the applicants' request for approval of the Pact's renewal for an indefinite period that the principle of mutual aid is intended to become a long-term feature of labor-management relations in the industry, thus giving rise to important policy issues.

In these circumstances, the Board believes that it should have the benefit of a record developed through a full evidentiary hearing in order to resolve the issues presented by the carriers' application. The investigation will furnish a means for a complete reexamination of the issues previously considered by the Board in the light of such new matters as may have developed since 1964.

The seven Pact members will be made parties to the investigation, together with the objecting unions and any other organizations designated as collective bargaining representatives of these carriers which desire to intervene. Because of the importance of the issues and its desire to be fully informed as to the views of other Government agencies, the Board will invite such agencies to participate in the case.[3]

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[3] The Board will send a copy of this order to the Commerce, Justice, and Labor Departments, the National Mediation Board, the National Labor Relations Board and the Department of Transportation.

Airlines Mutual Aid Agreement (Renewal)
Order No. E-26000

ACCORDINGLY, IT IS ORDERED:

1. That an investigation be and it hereby is instituted in Docket 9977, pursuant to the provisions of sections 204 (a), 412, and 1002(b) of the Act, to determine whether continued approval of the Pact is not adverse to the public interest and not in violation of the Act, and, what terms, conditions and limitations, if any, should be attached to such approval;

2. That the following persons be and they hereby are made parties to the investigation: American, Braniff, Eastern, Northwest, Pan American, TWA, and United: ALDA, ALPA, APA, BRC, FEIA, IAM, and TWU;

3. That each carrier party shall serve a copy of this order upon each employee organization with which the party bargains collectively as representative of its employees, other than the organizations named as parties by paragraph 2 hereof, and file a report of such service with the Board within 10 days of the date of this order; and

4. That the investigation instituted herein be assigned for hearing before an examiner of the Board at a time and place hereafter to be designated.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

APPENDIX H

Airlines Mutual Aid Agreement (Renewal) Order Denying Leave to Intervene and Referring Request to Remand

Order 70-1-100 (1970)

Mutual Aid Agreement (Renewal)
- Order 70-1-100

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 20th day of January, 1970

Docket 9977

ORDER

A petition to intervene in this proceeding was filed by North Central Airlines, Inc., (North Central) and Mohawk Airlines, Inc., (Mohawk) on December 12, 1969. Petitioner air carriers allege that since the agreement is by its terms limited to trunk carriers, and since the carriers which would benefit from the agreement are competitors of the petitioners, to the extent the agreement affects the strength of their competitors while foreclosing participation in the agreement by petitioners, it is a matter in which petitioners have a direct financial interest. While conceding that this petition should have been filed almost two years ago to be timely, petitioners state that because of recent inflationary pressures on wages and other costs, they need to be insured against strike losses, and that while they are engaged in efforts to obtain a mutual aid agreement with other carriers, it is unclear whether the subject agreement should be amended to include participation by local service carriers or whether a companion agreement should be entered into. Petitioners allege that accordingly their interests

cannot be adequately represented unless they appear in these proceedings. Petitioners contend that their participation will not in any way delay the proceedings, since their participation will principally consist of submission of briefs and oral argument.

Answers were filed by the Six Union Parties [1] and by the Allied Pilots Association (Allied). In addition, the Air Line Pilots Association, International (ALPA) filed a motion to file an otherwise unauthorized document and a late answer attached thereto, and on January 2, 1970, the Carrier Parties filed a letter stating they take no position on the petition. The Board has determined to grant ALPA's motion. The Six Union Parties argue that the petition should have been filed two years ago, that recent increases in labor costs and the attendant need for strike insurance is not a sufficient reason for granting intervention, and that contrary to the petitioners' arguments, intervention will result in further delay of the proceedings. The Six Union Parties further argue that the question of whether a mutual aid agreement should be open to local service carriers should be decided in a separate and distinct proceeding, and that the subject petition is in effect an attempt to obtain Board reexamination of its prior disapproval of a mutual aid agreement between American Airlines and Mohawk.

Allied additionally contends that the petition is a request that the Board inject itself into collective bargaining

[1] Air Line Dispatchers Association; Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees; Communications Workers of America, AFL-CIO; Flight Engineers International Association; International Association of Machinists and Aerospace Workers; and Transport Workers Union of America.

and that Allied and other labor unions at American Airlines have no ties with petitioners.

ALPA additionally argues that it is impossible to adequately consider petitioners' contentions without redeveloping the evidentiary record with petitioners as participants, and that petitioners may base their position on evidence introduced through briefs and oral argument without the opportunity for cross-examination by other parties.

The Board has determined to deny the petition for leave to intervene. We find that the petition is untimely and that to permit petitioners' intervention as parties at this stage in the proceeding under the circumstances present would not be conducive to the orderly conduct of the proceeding. However, as a matter of discretion, the Board will permit petitioners to file a statement in the nature of an amicus curiae brief on the question of whether the Board should approve that portion of the agreement which limits participation in the agreement to trunk carriers.

The Board has also received a letter from the Six Union Parties, dated November 14, 1969, proposing that the Board remand the case to the examiner for the purpose of receiving the recently amended agreement into the record and receiving testimony with respect to the amendments. The letter states that the amendments substantially increase the level of supplemental payments, alter the conditions of entry and withdrawal, and modify the arbitration provisions. The letter alleges that these changes are "substantial and important".

A letter from the Air Line Pilots Association (ALPA) dated November 24, 1969, supports the proposal to remand the amended agreement. ALPA states that National Air-

lines, Inc., and Continental Air Lines, Inc., have rejoined the agreement and that Northwest Airlines, Inc., a party to the agreement, has announced its intention to merge with Northeast Airlines, Inc., a non-member. Therefore, ALPA alleges, there is a substantial increase in the total resources available to parties to the agreement.

Whether or not the Board should remand appears to be so interrelated to the merits of the matters to be argued that it does not seem appropriate at this time to pass on the question. Accordingly, we will defer acting upon this request until we have had the opportunity to consider the briefs and receive oral argument.

ACCORDINGLY, IT IS ORDERED THAT:

1. The motion of Air Line Pilots Association, International to file an otherwise unauthorized document be, and it hereby is, granted;

2. The petition of North Central Airlines, Inc., and Mohawk Airlines, Inc., for leave to intervene be, and it hereby is, denied;

3. A statement in the nature of an amicus curiae brief may be filed by North Central and Mohawk no later than February 2, 1970; and

4. The request of the Six Union Parties to remand this proceeding for further evidentiary hearings on the amended agreement be, and it hereby is, deferred.

By the Civil Aeronautics Board:

HARRY J. ZINK
Secretary

(Seal)

APPENDIX I

Airlines Mutual Aid Pact
Order 70-7-114 (July 23, 1970)

Opinion of the Board

Opinion of Chairman Browne, concurring

Opinion of Members Minetti and Murphy, dissenting

Initial Decision of Examiner Arthur S. Present (1969)

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

DOCKET 9977

(70-7-114)

Agreement CAB 21415

AIRLINES MUTUAL AID PACT

Decided: July 23, 1970

The Mutual Aid Agreement is not found adverse to the public interest or in violation of the Act and is approved for an indefinite period subject to conditions.

Appearances:

CHARLES A. MILLER, HOWARD C. WESTWOOD, ROBERT N. SAYLER, and SALLY PAYTON for American Airlines, Inc., Braniff Airways, Inc., Eastern Air Lines, Inc., Northwest Airlines, Inc., Pan American World Airways, Inc., Trans World Airlines, Inc., and United Air Lines, Inc.

JAMES L. HIGHSAW, JR., for Air Line Dispatchers Association, Brotherhood of Railway, Airline and Steamship Clerks, Communication Workers of America, Flight Engineers International Association, International Association of Machinists and Aerospace Workers, and Transport Workers Union of America.

R. J. RASENBERGER for Mohawk Airlines, Inc. and North Central Airlines, Inc.

ROBERT SAVELSON for Air Line Pilots Association, International.

ALAN OSTER for Allied Pilots Association.

HERBERT A. ROSENTHAL and ALEXANDER N. ARGERAKIS for the Bureau of Operating Rights, Civil Aeronautics Board.

Opinion

BY THE BOARD:

Once again the Mutual Air Agreement, providing for inter-carrier financial assistance in certain types of strikes, is before the Board. The original Agreement was approved, effective for one year, in 1959,[1] and an amended Agreement was approved in 1964 for a period of three years.[2] Seven carriers then parties to the Agreement applied for renewal of the amended Agreement, and the matter was assigned for hearing before Examiner Arthur S. Present. In his initial decision of March 7, 1969, the examiner found that the Agreement is not adverse to the public interest or in violation of the Act and should be approved for an indefinite period subject to conditions. We granted review, and briefs and oral argument have been received on behalf of the Carrier Parties,[3] the Six Union Parties,[4] and the Air Line

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[1] Six-Carrier Mutual Aid Pact, 29 C.A.B. 168, reconsideration denied, 30 C.A.B. 90 (1959).

[2] Mutual Aid Pact Investigation, 40 C.A.B. 559 (1964).

[3] The seven carrier parties to the proceeding are American Airlines, Braniff Airways, Eastern Air Lines, Northwest Airlines, Pan American World Airways, Trans World Airlines, and United Air Lines. Pursuant to amendments to the Agreement adopted as of October 31, 1969, Continental Air Lines, National Airlines, and Western Air Lines have joined.

[4] The Air Line Dispatchers Association, the Brotherhood of Railway and Steamship Clerks, the Communication Workers of America, the Flight Engineers International Association of Machinists and Aerospace Workers, and the Transport Workers Union of America.

Pilots Association, International (ALPA). In addition Mohawk Airlines and North Central Airlines filed a joint brief as *amici curiae* and participated in oral argument.

In addition to review of the initial decision, there are two developments occurring since its issuance which must be considered here. First are amendments to the Agreement entered into as of October 31, 1969. Second is the request of Mohawk and North Central that the Board withhold approval of the Agreement until appropriate steps are taken to assure the participation of these carriers and any other local service carrier in the Agreement at issue or a comparable one with terms at least as favorable and with participation by the same trunkline carriers.

Upon consideration we find that the Agreement, both in the form passed on by the examiner and as amended on October 31, 1969, should be approved for an indefinite period subject to the conditions imposed by the examiner and that the request of Mohawk and Lake [*sic*] Central should be denied.

The Agreement considered by the examiner is summarized in the initial decision at page 2 and is set forth in full in Appendix A to the initial decision. Its terms were also discussed in detail in the Board's prior decision.[5] The Agreement, in brief, provides that if a specified type of strike occurs, non-struck carriers shall pay a struck carrier or carriers "windfall" payments, the increased revenues attributable to the strike, plus "supplemental" payments, if the windfall payments do not equal 25 percent of the struck carrier's normal operating expenses. While we shall, subsequently, compare terms of this Agreement affected by recent amendments, no further discussion of its provisions appears warranted.

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[5] 40 C.A.B. at 573-577, 599-600.

Opinion

As indicated above, the examiner concluded that the Agreement is not adverse to the public interest or in violation of the Act and should be approved for an indefinite period subject to conditions. His principal findings underlying this conclusion are that the Agreement is fully consistent with national labor policy; that developments since the prior proceeding further support the contribution of the Agreement to airline stability; that the evidence establishes that the Agreement has had little, if any, impact on labor-management relations; and that the evidence does not show that the pact has had any material effect upon the collective bargaining process.

We have carefully considered the contentions of the parties in the light of the record and find that we are in agreement with the examiner's decision, except as to the relatively minor aspects noted below. Accordingly, except to the extent modified herein, we adopt as our own the findings and conclusions of the examiner as contained in the initial decision attached hereto as an Appendix.

The contentions of the Six Union Parties and ALPA in opposition to the Agreement addressed to the Board are substantially the same as those raised with the examiner. His treatment of these contentions is comprehensive and thorough, and we shall consider here only (1) those contentions involving the Agreement approved by the examiner which we feel justify further discussion, (2) issues relating to the October 31, 1969 amendments, and (3) the question of exclusion of local service carriers.

I.

As before, an attempt is made to demonstrate by statistics that the Agreement has contributed to industrial strife and strikes. Referring to Carrier Exhibit 20, the Six Union Parties point to the fact that during 110 months prior to the Agreement there were 40 strikes and that during an equivalent period under the Agreement there were 42,[6] an incident increase of 5 percent. Further, they calculate that there were 514 strike days lost during 110 months prior to the Pact and 612 for an equivalent period under the Pact, an increase of 17 percent. The Six Union Parties are also critical of the examiner's comparison of strikes against parties to the Agreement as against strikes against nonparticipating carriers. They assert that the comparison is arbitrary and unexplained and that the statement that such a comparison discloses no important difference in the number of strikes or duration thereof is erroneous on the basis of the data employed and is supported only by a juggling of the data.

As the Board has previously held, "the bare fact that there may have been a deterioration in labor-management relations during the period of operation of the Pact covered by the record does not raise a presumption that the deterioration was caused by the Pact and such fact, standing alone, does not make out a 'prima facie case' that the Pact violates the public interest."[7] In our view the figures relied upon by the Six Union Parties do not make out such a prima facie case. There is no such marked upsurge in the incidence or length of strikes as to lead to any allowable inference that the Agreement is responsible for either.

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[6] Omitted are strikes against BOAC and Quantas [*sic*].

[7] 40 C.A.B. at 562-563.

This is particularly the case in the context of the entire record which does not show that the Agreement has had any material effect upon the collective bargaining process. Moreover, the comparisons made by both the Six Union Parties and the examiner to reach opposite results rely on unweighted data[8] which, in our judgment, are of insufficient probative value to reliably indicate either that the Agreement has or has not contributed to industry strife and strikes so as to adversely affect the public interest.[9] Finally, even if we were to indulge in the assumption that the increases in the number and length of strikes were caused by the mutual aid pact, these increases have not been of such magnitude as to have resulted in a qualitative adverse change in labor relations, offsetting the contributions to that stability which the Agreement brings.

The Six Union Parties characterize as a "myth" the examiner's conclusion that the airlines involved need the financial stability provided by the mutual aid agreement. They argue that in 10 years Pact members incurred a total strike loss of 246 million dollars of which 82 million was made up of Pact payments, leaving a final loss of 164 million dollars. Of this, some 116 million dollars, or 70 percent, was lost in the 1966 IAM strike. "Yet," they state, "it is clear in terms of the financial stability

[8] As to duration of strikes, the data do not distinguish among strikes against trunk carriers, all-cargo carriers, local service carriers, helicopter carriers, or foreign air carriers, although the Six Union Parties do exclude the latter from their figures. As to incidence, each strike is given equal weight regardless of the duration of the strike or the type of carrier struck.

[9] Accordingly, we do not adopt the examiner's statement, on the basis of the data, that the Agreement has not led to increased labor strife or the statistical comparisons employed by him in this connection. (I.D. 24-25).

of the airlines involved that they would have been much better off to have met the original IAM demands without quibbling than to follow the course they did." But the argument assumes an unsubstantiated predicate—that if there had been no Pact, there would have been no strike. We find, as did the examiner,[10] that the record does not support the claim that the availability of mutual aid was the determinative factor in inducing the carriers to take the 1966 strike.[11]

ALPA argues, among other things, that the Pact as applied to it is inconsistent with the national labor policy[12] and violates the Railway Labor Act. The examiner rejected the argument,[13] we believe correctly, but additional discussion is appropriate because ALPA has cited to us cases not cited to the examiner.

ALPA asserts that, contrary to the initial decision, court decisions in cases involving multi-employer economic activity against employees have limited its permissible scope to action which is (1) confined to a multi-employer

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[10] I.D. 35.

[11] It may be noted also that we do not read the initial decision (I.D. 35-37), as do the Six Union Parties, as criticizing union refusal to accept the 3.2 percent offer. In any event, we neither criticize nor endorse this refusal.

[12] The examiner concluded that the Board must heed the national labor policy, and it must accomodate the objectives of the Act to the purposes of the national labor policy (See I.D. 10-13). The Six Union Parties contend that the examiner erred in considering national labor policy, citing certain dicta in the 1959 decision (29 C.A.B. at 173). While there is language in the first Board opinion that matters of general policy as to labor disputes are not to be considered as a public interest factor, it is clear from the opinion on reconsideration as well as the 1966 decision that the Board has always regarded as a relevant consideration whether the Agreement is consistent with national labor policy (See 30 C.A.B. at 92; 40 C.A.B. at 562, 609-610).

[13] I.D. 14-17.

bargaining unit, and (2) only for purposes of protecting the multi-employer bargaining unit in the face of union activity directed at its common front or integrity. The reach of the decisions cited by ALPA is far from sustaining its position that, since the airline industry does not bargain as a unit with ALPA, any multi-employer economic action—and specifically mutual aid—is unlawful as applied to it.

Three decisions cited by ALPA hold that a lockout by all members of a multi-employer bargaining group in response to strike against one member is lawful.[14] But none of these cases hold that multi-employer economic action is lawful only for purposes described by ALPA, nor do they even discuss the question. In *NLRB* v. *Great Atlantic & Pacific Tea Co.*,[15] the Court of Appeals for the Second Circuit, in an opinion by Judge Kaufman, held that a lockout by an employer group violated the National Labor Relations Act. Since the employees had not committed themselves to industrywide bargaining, it was found the employers' conduct lost the protective quality which would otherwise justify the lockout[16] and instead assumed the character of an offensive weapon which would unfairly advantage the employers in their demands for a multi-employer unit.

It is a very long step—and one we are not prepared to take—to conclude that because the lockout in the *A&P* case violated section 8(a)(3) and (7) of the National

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[14] NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87 (1957); NLRB v. Brown, 380 U.S. 278 (1965); International Ass'n of M. & A. W. v. National Ry. Labor Conf., 310 F. Supp. 905 (D.C.D.C., 1970).

[15] 340 F. 2d 690 (C.A. 2, 1965).

[16] See NLRB v. Truck Drivers Local Union No. 449, *supra*.

Labor Relations Act,[17] the Mutual Aid Agreement violates the Railway Labor Act.[18] There is no evidence whatsoever that the Agreement in any way infringes on the right of employees to organize and bargain collectively through representatives of their own choosing under Section 2, Fourth; or requires any person seeking employment to sign a contract or agreement prohibited by Section 2, Fifth; or obstructs carrier-employee agreements sanctioned by Section 2, Eleventh. Nor are there any facts or circumstances set forth by ALPA from which a *per se* violation may be inferred.[19] Moreover, we do not, as does ALPA, construe Judge Kaufman's opinion in the *A&P* case as qualifying in any degree his opinion in *Kennedy* v. *Long Island Railroad Company*[20] upholding the legality of the railroads' strike insurance plan. Accordingly, we find that ALPA's arguments are without merit.

For the foregoing reasons and those set forth in the initial decision, as modified herein, we conclude that the Agreement which was the subject of the renewal proceeding should be approved. We next consider the Agreement as subsequently amended.

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[17] These sections provide, respectively, that it shall be an unfair labor practice for an employer (1) to interfere with, restrain or coerce employees in the exercise of the rights of employees as to organization, collective bargaining, etc. and (2) by discrimination in regard to hire or tenure of employment or any terms or condition of employment to encourage or discourage membership.

[18] The only sections of the R.L.A. cited by ALPA in this connection are Sections 2, Fourth, Fifth and Eleventh, covering rights similar to those referred to in the previous footnote.

[19] See *Kennedy* v. *Long Island Rail Road Company*, *infra*.

[20] 319 F. 2d 366 (C.A. 2, 1963), *cert. den.* 375 U.S. 830 (1963).

II.

By letter of October 31, 1969, filed in this docket, the Carrier Parties advised the Board that as of that date they had agreed to several amendments to the Agreement. Previously, they noted, in the event of strikes covered by the Agreement, the other struck members paid their net windfall revenues to the struck carrier or carriers and, in addition, made supplemental payments to the extent necessary so that the receipts of the struck carrier or carriers would equal 25 percent of normal operating expenses for the operations shut down by the strike. The amendments increase the level of supplemental payments to 50 percent of the struck carrier's normal operating expenses during the first two weeks of the strike, 45 percent for the third week, 40 percent for the fourth week, and 35 percent for any period thereafter. The amendments also increase the annual maximum liability of any carrier for supplemental payments from one-half percent to one percent of its air transport operating revenue for the previous calendar year.[21]

Other principal features of the amendments to the Agreement include:

(1) Alteration of the conditions of entry to permit any trunk carrier to join the Agreement by November 15, 1969, without a waiting period or back payment.

(2) Modification of the conditions of withdrawal to provide that withdrawal may take effect at the end of

[21] Except that the parties may agree at any time in writing that the liability for additional payments in a particular calendar year shall be subject to a higher percentage limitation, in which event any carrier that thereafter joins the Agreement shall be subject to such Agreement to increase liability in the calendar year in which its adherence becomes effective.

any calendar year beginning December 31, 1972, provided that one-year's notice of withdrawal be given.

(3) Modification of the arbitration clause to provide that disputes concerning the amount of any payment shall be subject to arbitration. Previously, only disputes over the requirement to make or the right to receive payment were subject to arbitration.

On December 2, 1969, the Agreement, in substantially the same form as attached to the letter, was formally filed under section 412 of the Act (C.A.B. 21445). In their brief, the Carrier Parties state that pursuant to the foregoing amendments, Continental, National, and Western have joined the Agreement, the latter's adherence becoming effective August 3, 1970.

In response to the carriers' notice of amending the Agreement, the Allied Pilots Association renewed their request that the Agreement not be approved with respect to American Airlines. A request of the Six Union Parties, supported by ALPA, to remand this proceeding for further evidentiary hearings on the amended agreement was deferred.[22]

We have decided to pass on the amended Agreement at this time without remand. Lengthy proceedings have been had on two earlier versions of the Agreement, and there has been thorough exploration of the basic issues affecting the public interest in each proceeding. Moreover, it has not been demonstrated why a further hearing is necessary or what new facts would be brought out on remand. We, therefore, do not believe that the public interest, or the proper dispatch of the Board's work, would be served by further hearings on the latest version. We have before

[22] Order 70-1-100.

us, we believe, sufficient facts on which to predicate a judgment as to whether the amended Agreement is adverse to the public interest or in violation of the Act. We conclude that the amended Agreement should be approved.

The Carrier Parties assert that several factors necessitated the increase in the protection provided by the recent amendments. Briefly, it is asserted that: (1) strike losses have continued to mount; (2) the financial ability of airlines to withstand strikes has significantly deteriorated; (3) the prior level of supplemental payments was insufficient to enable the carriers to resist excessive and highly inflationary union demands; (4) the effectiveness of Mutual Aid is directly related to the number of trunklines participating in it: membership of all principal competitors of a struck carrier greatly strengthens the "windfall" provisions, and the availability of protection to virtually all trunklines adds significantly to the industry's ability to resist excessive demands. In their brief, the Six Union Parties contend that the carriers' arguments are nothing more than a claim that failure justifies more extended efforts, and the carriers appear to have become "boxed in" by their own past failures and the inability to back up and take a good look at the situation and find some other course. Further approval, they assert, "will simply be one more step on the road to escalation of industrial warfare, one more step into the mess from which the air carriers and the Board will find it increasingly difficult to extricate the industry, and one more step on the road to disaster."

This baleful prophecy is accompanied by no facts. There is no record support for the supposition that the Agreement considered by the examiner resulted in an "escalation of industrial warfare," and there is no reason to believe that the amended Agreement will have any such result.

While the recent amendments strengthen the Agreement, they do not change its basic nature or add any new element which suggests that it, unlike its predecessors, is adverse to the public interest. Thus, in light of the record compiled with respect to the previous Agreement, we are unable to conclude that the amended Agreement will induce strikes or exacerbate labor-management relations or create an imbalance in the collective bargaining process so as to pose a threat to the attainment of the public interest objectives of the Act.[23] Further, as in the case of the prior Agreements submitted to the Board and for the reasons previously assigned, we find that the amended Agreement is consistent with national labor policy and violates neither the Federal Aviation Act nor the Railway Labor Act.

As to the positive contribution of the amendment Agreement to airline stability. we have had occasion recently to take note of the accelerated cost pressures on the carriers and the marked decline in their earnings and profit margins.[24] In its 1964 opinion the Board stated: "The Pact offers, at a not unreasonable cost for the protection obtained, a substantial measure of relief against the costs of strikes, in this fashion and to this extent contributing to industry stability."[25] The cost of protection is still not unreasonable,[26] in light of their deteriorated financial position the need for protection is greater, and the cost of

[23] See 29 C.A.B. at 173-174.

[24] Order 69-9-68, September 12, 1969.

[25] 40 C.A.B. at 561.

[26] The liability of any carrier for supplemental payments is limited to one percent of its air transport revenues for the previous calendar year.

strikes has increased sharply.[27] What was said concerning the contribution of the prior Agreement to air carrier stability applies with greater force today. We recognize that the new Agreement will provide substantially greater recoupment of strike losses, particularly in the case of short strikes when maximum benefits will be provided.[28] However, for the reasons set forth above, we do not believe that this factor overrides the favorable aspects of the Agreement. Furthermore, it hardly seems reasonable to believe that a carrier will risk a strike on speculation that the strike will be short and that the carrier will realize the maximum benefits. Carriers must, under the new Agreement, as under the old, face the prospect that in all probability mutual aid will not meet their strike losses. Finally, the possibility of permanent diversion of traffic to competing carriers will serve as a positive incentive for carriers to avoid strikes.

For the foregoing reasons we shall approve the amended Agreement, subject to terms imposed with respect to the prior Agreement and for an indefinite period for the reason given by the examiner in his decision on the prior Agreement.[29]

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[27] During the period 1961-1966, carriers struck two or more times have experienced the following strike losses per day: Eastern: 1961—$466,000; 1962—$300,000; 1966—$600,000; Pan American: 1961—$523,000; 1964—$350,000; 1965—$585,000; TWA: 1961—$386,000; 1966—$1,303,000; United: 1963—$336,000; 1966—$1,422,000. (Carrier Exh. 32).

[28] As noted previously, a struck carrier receives 50 percent of normal operating expenses for the first two weeks, with a 5-percent tapering off in each successive week until a 35-percent level is reached.

[29] The signatories to the Agreement are cautioned that our approval does not extend to any agreement entered into pursuant to Paragraph 1(B)(2) raising a party's liability for supplemental payments in any calendar year beyond one percent of a party's air transport revenues for such prior calendar year.

III.

We turn finally to the request of Mohawk and North Central that the Board withhold approval of the new Agreement until appropriate steps are taken to assure the participation of local service carriers in the Agreement or in a comparable one with terms at least as favorable and with participation by the same trunkline carriers. The Six Union Parties and ALPA oppose the participation of local service carriers. The Carrier Parties urge that the Board approve the Agreement, and they state that after this is done, the trunk carriers are prepared to turn to the question of local service participation.

The request of Mohawk and North Central will be denied. The exclusionary provision in the new Agreement is the same as that in the Agreement considered in the renewal proceeding. Yet the two carriers did not seek to intervene until nine months after the initial decision issued. We denied this request for intervention on the ground that the petition was untimely and that grant of intervention at that stage would not be conducive to the orderly conduct of the proceeding.[30] While the carriers were permitted to file a statement in the nature of an *amicus curiae* brief, it was to be limited to the question of whether the Board should approve that portion of the Agreement which limits participation in the Agreement to trunkline carriers. The relief requested, however, appears to go beyond this issue, and to withhold approval of the Agreement, as they ask, would be no more conducive to the orderly conduct of the proceeding than would their intervention have been.

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[30] Order 70-1-100.

Moreover, on the issue on which Mohawk and North Central have been permitted to be heard, they have not shown that the exclusionary provisions of the Agreement are anti-competitive in their purpose or effect, or that they or local service carriers generally have been prejudiced by it. On the very scant record before us on the question we are not prepared to find that the provision is adverse to the public interest.

We are also mindful of the fact that Mohawk and North Central speak only for themselves and not for local service carriers generally and that the trunk carrier parties do not oppose in principle local service participation. This is a matter which may well be considered by the two segments of the industry and our decision denying the request of Mohawk and North Central is without prejudice to any future agreement of this nature which may be filed.

We have given due consideration to all the contentions of the parties, and find, except to the extent indicated, that they do not alter our decision herein.

Accordingly, in view of the foregoing and all the facts of record, it is found that the Mutual Aid Agreement, including the amended Agreement filed on February 5, 1970, is not adverse to the public interest or in violation of the Act and should be approved, subject to the following conditions:

1. The approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act;

2. The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

3. In accounting for the amounts due to others and the amounts due from others under the Agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by Part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the Agreement as may be reasonably required by the Director of the Board's Bureau of Operating Rights; and

4. Copies of all arbitrators' decisions and awards issued under this Agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

An appropriate order will be entered.

GILLILLAND, Vice Chairman, and ADAMS, Member, concurred in the above opinion. BROWNE, Chairman, also concurred and filed the attached statement. MINETTI and MURPHY, Members, filed the attached dissent.

BROWNE, Chairman, Concurring:

On the matter of local service carrier participation in the Mutual Aid Agreement, I agree that the request of Mohawk and North Central should be denied, and that approval of the agreement should not be withheld.

My position is predicated on the grounds that the Board has *not* decided that Mohawk and North Central should be

excluded from the agreement, that Mohawk and North Central are late comers to this proceeding, and deferral of action on this agreement is unnecessary to afford them relief, and that the trunkline carriers are committed to extending full consideration to local service carrier participation in the agreement.

Under section 412 of the Act, the Board may always reconsider approval of an agreement if the facts indicate that continuing approval is adverse to the public interest. Mohawk and North Central are free to bring the issue before the Board at a later time if the trunkline carriers fail to afford them the proper consideration.

MURPHY and MINETTI, Members, Dissenting:

The record before the Board is incomplete and we would remand the case to the examiner for further proceedings. The agreement as submitted to the examiner involved seven trunkline carriers. It provided that "windfall" payments would be supplemented where necessary to provide a struck carrier with 25 percent of its normal operating expenses and that the annual maximum liability of any one carrier for supplemental payments would be limited to ½% of its operating revenues for the previous year.

However, subsequent to the initial decision, the carriers changed the agreement in three significant respects. The number of trunk carriers covered by the agreement was expanded so that the agreement is now essentially an industry-wide pact among trunk carriers.[1] The amount of supplemental payments to a struck carrier has been doubled to a full 50% of its operating expenses for the initial period of a strike and finally, the liability of each non-struck car-

[1] Only Northeast and Delta are outside the agreement and Northeast is seeking to merge with Northwest which is a pact member.

rier for supplemental payments has been doubled. The Board is now being asked to approve not the agreement which was before the examiner but a significantly revised version of that agreement. In our view, there is insufficient reliable or probative evidence before the Board upon which to judge whether the new agreement is or is not adverse to the public interest.

As the majority recognizes, the new agreement provides substantially greater recoupment of strike losses by the carriers than would the earlier agreement particularly in the first stages of a strike. In fact, if the present agreement had been in effect from the beginning, it appears that the struck carriers would have received mutual aid benefits in *excess* of their actual strike losses in at least five of the 18 strikes occurring during the period 1958-1968 on which cost information is contained in the record.[2] There is a serious question, therefore, whether the rate of payments under the new agreement is not set at so high a level as to encourage a carrier to accept a work stoppage rather than settle a labor dispute. Some affected parties contend there is a point at which supplemental payments would be high enough to have such an effect and we believe this aspect of the revised agreement, among others, must be fully explored before an examiner. In our view, basic concepts of administrative due process require no less.

We cannot join the majority in approving the agreement with these new provisions for an indefinite period of time solely on the basis of a record compiled in the light of significantly different provisions and the self-serving briefs by the parties.

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[2] See carrier exhibit 33.

ORDER

A full public hearing having been held in the above-entitled proceeding in Docket 9977 and argument having been received with respect to Agreement CAB 21445, and the Board, upon consideration of the record and the submission made, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That Agreement CAB 12633, as amended by Agreements CAB 12633A1 through A8, and Agreement 21445 (either hereinafter referred to as the "Agreement"), be and they hereby are approved, subject to the following conditions:

(a) The approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act;

(b) The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

(c) In accounting for the amounts due to others and the amounts due from others under the Agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by Part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating

to the operations of the Agreement as may be reasonably required by Director of the Board's Bureau of Operating Rights; and

(d) Copies of all arbitrators' decisions and awards issued under this Agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

2. That except to the extent granted herein, all applications, requests and motions involved in this proceeding be and they hereby are denied and the investigation instituted by Order E-26000 be and it hereby is terminated.

INITIAL DECISION OF EXAMINER ARTHUR S. PRESENT, MARCH 7, 1969

Preliminary Statement

For the third time the Mutual Aid Agreement (hereinafter referred to as the "Agreement") is before the Board. The original agreement among air carriers providing for mutual aid in the event of a strike, effective for only one year, was approved by the Board in 1959. *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168, reconsideration denied, 30 C.A.B. 90 (1959). The currently effective Agreement was approved by the Board in 1964 for a period of three years. *Mutual Aid Pact Investigation*, 40 C.A.B. 559. By timely application filed on May 2, 1967, the seven present Carrier Parties[1] to the Agreement

[1] American Airlines, Inc., Braniff Airways, Inc., Eastern Air Lines, Inc., Northwest Airlines, Inc., Pan American World Airways, Inc., Trans World Airlines, Inc., and United Air Lines, Inc.

ask the Board to renew the approval of the Agreement for an indefinite period.

Upon consideration of the application, answers filed by certain employee organizations requesting that the application be denied or, in the alternative, be set down for hearing, and a reply submitted by the Carrier Parties, the Board decided to institute this investigation to determine whether continued approval of the Agreement is not adverse to the public interest and not in violation of the Federal Aviation Act of 1958, as amended, and, if the Agreement should be approved, what terms, conditions, and limitations, if any, should be attached to the approval. Order E-26000, November 17, 1967. The Board's order also assigned the matter for hearing.

After due notice, public hearing was held. Initial and reply briefs have been filed.

The Agreement

The terms of the Agreement are set forth in Appendix A and were described in detail in the Board's prior decision, 40 C.A.B. at 573-577, 599-600. However, for the purposes of this decision, a brief resume may be helpful at this juncture.

The Agreement provides for mutual assistance in the event any party's flight operations should be shut down by a strike which has been called (1) for reasons which include the enforcement of demands in excess of or opposed to the recommendations of a board established by the President of the United States under section 10 of the Railway Labor Act and applicable to such party; or (2) in the absence of the establishment of such a board or in case such a board fails to make specific recommenda-

tions on the merits for the settlement of the issues in dispute and the struck party has in all respects complied with the Railway Labor Act; or (3) before the employees on strike have exhausted the procedures of the Railway Labor Act; or (4) otherwise unlawfully.

If a strike fulfilling the requirements of the Agreement should occur, the parties remaining in operation pay to the strike-bound carrier their increased revenues during the term of, and attributable to, the strike less applicable added direct expenses. Moreover, if these so-called "windfall" payments do not equal 25 percent of the normal air transport operating expenses of the flight operations shut down as a result of the strike, each operating carrier must pay a proportionate share ("supplementary" payment), limited in any one calendar year to an amount equal to one-half of one percent of its air transport operating revenues for the previous calendar year, of the sum needed to furnish the minimum percentage.

Only trunkline carriers are eligible to become parties to the Agreement. Any trunkline carrier which elects to become a party to the Agreement is liable for all payments it would have had to make if it had been a party on and after January 1, 1962, less all amounts which it would have been entitled to receive for such period. In lieu thereof, a carrier which had not been a party to the Agreement prior to January 1, 1962, may choose to become a party by giving six months' notice of its desire to become a party.

A party may withdraw from the Agreement as of December 31 of any year by providing at least 60 days' written notice. In such case, the carrier remains obligated, for a period of 12 months following the month in which the withdrawal became effective, to make the payments re-

quired by the Agreement to the extent it has received, on or after January 1, 1962, supplementary payments in excess of the supplementary payments it has made.

Pertinent Statutory Provisions

The basic statutory provision applicable is section 412 of the Federal Aviation Act of 1958, as amended, which covers certain agreements between air carriers affecting air transportation. Under subsection (b):

> The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; * * *

Section 102 of the Act requires that the Board consider in the public interest, among other things:

> (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> (b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

Furthermore, under section 401(k)(4) of the Act:

It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.

Issues

The issues, as determined at the prehearing conference, are of broad scope. Without attempting to delineate all the subissues, and recognizing that there is some overlap among the issues stated, they are as follows:

Will renewal of the Agreement be adverse to the public interest?

If renewal of the Agreement is approved, what conditions, limitations, or restrictions, if any, should be imposed?

Have the existence of the Agreement and the activities pursuant to it been adverse to the applicable provisions or policies of the Railway Labor Act, as amended?

Will the Agreement result in restraints on competition or other forms of discrimination against air carriers which are not parties to the Agreement?

Will renewal of the Agreement adversely affect labor-management relations in the air transportation industry?

Has the existence of the Agreement prevented or encouraged the institution of industry-wide collective bargaining and, if so, is such a prevention or encouragement adverse to the public interest?

Has the existence of the Agreement resulted in a derogation of the duty to bargain collectively in good faith on the part of management or labor?

Will the renewal of the Agreement have an adverse effect on industrial peace and the public convenience?

Does the Agreement have the effect of directly or indirectly broadening Government participation in collective bargaining and labor-management relations?

Have the carrier parties to the Agreement complied with the reporting and other requirements as prescribed in prior Board orders?

What effect should actions of the Board such as the orders granting exemption authority to nonstruck carriers to provide additional service to points on their own route systems during the 1966 strike by the International Association of Machinists and Aerospace Workers (IAM) have in the instant proceeding?

How should the availability to struck carriers of military contract revenues affect the instant proceeding?

What have been the effects of the broadening of coverage of the Agreement, to include supplemental payments as well as windfall payments, since 1958?

However, as will become apparent from the contentions of the parties, described hereinafter, there is no controversy in regard to some of the issues.

Contentions of Parties

Carrier Parties

The Carrier Parties request approval of the Agreement for an indefinite period. They contend that disapproval of the Agreement by the Board would contravene the national labor policy and constitute a gross abuse of the Board's discretion. It is their position that the Agreement represents a positive force in the airline industry by contributing to airline stability. Furthermore, they maintain that the Agreement has not adversely affected the collective bargaining process or labor reations on mutual aid carriers. Finally, the Carrier Parties aver that developments since the last proceeding strengthen the conclusion that the Agreement is consistent with the public interest.

Six Union Parties

The Six Union Parties[2] oppose the application and ask that the Agreement be disapproved as adverse to the public interest. They do not claim that the Agreement violates any specific provision of the Federal Aviation Act or of the Railway Labor Act, although they contend that the Agreement defeats the purposes of the latter statute. The Six Unions maintain that the Board's jurisdiction over the Agreement does not extend to the consideration of general labor policy, and the basic criterion to be applied concerns the impact of the Agreement upon industrial strife in the air transportation industry. Employing that standard, the Six Unions as-

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[2] A joint presentation was made by the Air Line Dispatchers Association, the Brotherhood of Railway, Airline and Steamship Clerks, the Communication Workers of America, the Flight Engineers International Association (FEIA), the IAM, and the Transport Workers Union of America.

sert the Agreement has brought increased labor strife and interruptions to interstate air commerce. Moreover, they contend that the Agreement creates a conflict of interest in the conduct of labor-management relations in the air transport industry and that the Agreement is detrimental to the carriers. They urge that for these reasons the Agreement is adverse to the public interest and defeats the purposes of the Railway Labor Act.

Air Line Pilots Association, International

The Air Line Pilots Association, International (ALPA), notes that in the earlier proceedings it participated jointly with other unions and states that it is now appearing separately because of substantial changes in the industry and pilot-carrier labor relationships since the conclusion of the prior hearing and because of the serious impact of possible Board approval. ALPA requests denial of the application in its entirety or at least with respect to ALPA.

ALPA alleges that the Agreement is unnecessary, violates the Railway Labor Act with respect to multi-employer economic activity against employees, is inconsistent with Federal court decisions which limit the economic options available to a carrier during a strike, and is adverse to the public interest because it has not contributed to freedom from industrial strife or fostered sound economic conditions in the air transport industry; rather, it has functioned to disrupt the collective bargaining process and negatively affect pilot-carrier relationships.[3]

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[3] By letter of December 26, 1968, ALPA requests the Examiner to strike from the record certain portions of the Carrier Parties' initial brief on the ground that those portions contain references to matters

Allied Pilots Association

The Allied Pilots Association (APA) is the exclusive bargaining representative for the pilots in the employ of American Airlines, Inc. APA submits that renewal of the Agreement would be contrary to the public interest and the application should not be approved. APA contends that the Agreement increases the likelihood, and prolongs the duration, of work stoppages in the airline industry. As an alternative, APA urges that the Agreement should not be approved with respect to American or any other carrier which fails to demonstrate that its employees' interests and organizations are so interrelated with those of organized employees on other carriers that the carrier in question must, of necessity, conduct its industrial relations in concert with other carriers.[4]

Bureau of Operating Rights

The Board's Bureau of Operating Rights (Bureau) recommends that the Agreement be approved for a period of five years. It contends that the findings and conclusions

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not included in the record. The Carrier Parties answered by letter dated January 3, 1969, and ALPA replied in a letter dated January 6, 1969.

ALPA's letter of December 26 constitutes, in effect, a motion to strike governed by Rule 18 of the Board's Rules of Practice. As such, it must conform with Rules 3 and 4 of the Board's Rules of Practice. However, it does not comply with the requirements of the Rules, and neither does the answer or reply. In addition, no permission to file a reply was granted pursuant to Rule 18(c). In these circumstances, APLA's letters and the letter of the Carrier Parties shall be disregarded.

[4] Although APA appeared at the hearing and participated in the cross-examination of Carrier Parties' witnesses, it did not present affirmative evidence and did not submit a brief to the Examiner. The position recited above was taken at the prehearing conference and presumably has not been changed.

made by the Board in the prior proceeding remain valid and the present record does not furnish a satisfactory basis for disapproval. The Bureau also maintains that the factual considerations which moved the Board to approve the Agreement for a temporary period—unresolved overcapacity problems and unsettled crew complement issues—are still applicable. Accordingly, the Bureau believes that the Agreement should be reexamined at some point in the future, and it suggests five years from July 1967 as a time consistent with the Board's prior temporary approval.

Discussion

In setting this matter for hearing, the Board sought the benefit of a record developed through a full evidentiary hearing to resolve the disputed questions of fact and important policy issues involved here. The Board said, "The investigation will furnish a means for a complete reexamination of the issues previously considered by the Board in the light of such new matters as may have developed since 1964." Order E-26000 at 2. Consequently, the focus of inquiry is on whether there is additional evidence or evolution in the law since the last proceeding which, considered alone or together with the record of the prior proceeding, call for a result different from that twice reached by the Board.

The Examiner has carefully considered the evidence and the contentions of the parties and, on the basis thereof, is convinced that the Agreement should be approved without a time limit. Events which have transpired since the last decision have been added to the record. Reference has been made to court decisions since the prior Board approval. Nevertheless, in the main, the essence of the

record and the arguments of the parties are the same as when previously reviewed by the Board. While details as to labor-management relations may differ since the record leading to the 1964 decision was developed, in substance there has been little change. And although some novel arguments have been advanced in the current proceeding, the applicable legal principles remain unaltered. In these circumstances, it serves no useful purpose to deal with all the contentions of the parties; such an approach would entail a detailed repetition of findings and conclusions in the prior Board decisions to an unnecessary extent. Accordingly, the Examiner will confine his discussion to those contentions which because of their importance or uniqueness merit comment.

Issues Not in Controversy

The parties have not adduced any evidence directed at anti-trust considerations. That matter was discussed in the prior decision. 40 C.A.B. at 581-582, and no departure from the findings and conclusions therein is warranted. Nor is there evidence that the Carrier Parties have failed to fulfill the requirements of prior Board orders involving the Agreement.

Role of National Labor Policy

In determining whether or not the Agreement is adverse to the public interest, there is substantial dispute over the place of national labor policy. The Carrier Parties contend that the national labor policy is incorporated into the public interest standard of section 412 of the Federal Aviation Act. They assert that the Board must give great weight to the national labor policy and must accomodate that policy to the considerations contained in section 102

of the Act. It is the position of the Carrier Parties that if the labor policy authorizes mutual employer self-help arrangements, such as that afforded by the Agreement, it would be an abuse of the Board's discretion to disapprove the Agreement in the absence of some unique and compelling air transportation consideration.

The Six Unions contend that the Board's jurisdiction over the Agreement does not extend to consideration of general labor policy. They quote from the Board's initial opinion on mutual aid as follows (29 C.A.B. 173):

> The range of our inquiry, however, is limited to a determination of the effect of the agreement upon these statutory objectives. [Refers to section 102 of the Federal Aviation Act.] Matters of general policy as to labor disputes are not to be considered by the Board in assessing whether the agreement is adverse to the public interest. It is the function of Congress, and not of the Board, to weigh the wisdom of such agreements as a factor in the furtherance of labor policies not directly related to the promotion of a sound air transportation system. [Footnote omitted.]

The Six Unions claim the Board has thereby made clear that the basic criterion to be applied to the Agreement is its impact upon industrial strife in the air transportation industry.

The language quoted by the Six Unions does not mean that the Board can, without adequate justification, override general labor policy in administering the Federal Aviation Act. Thus, before reaching the point in its opinion where the quoted language lies, the Board had directed its attention at whether the Agreement violated the Rail-

way Labor Act, which Act prescribes the national policy for labor-management relations in the air transportation industry. Moreover, section 401(k)(4) of the Federal Aviation Act expressly requires that air carriers holding certificates comply with the Railway Labor Act. Therefore, while it is not generally the role of the Board to regulate airline labor policies or to evaluate the advisability of arrangements in connection therewith,[5] when labor matters come to the fore in relation to the Board's functions under the Federal Aviation Act, the policies of that Act and national labor policies must be accommodated, one to the other. *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156, 172 (1962).

Any doubt in this regard was settled by the Board in the prior proceeding. The Board declared (40 C.A.B. at 609-610):

> Prior to the enactment of the Act, Congress had prescribed the national policy relating to the regulation of labor-management relations in the air transportation industry by the enactment of title II of the Railway Labor Act in 1936. In so doing, it placed the air transportation industry *in genere* with the railroad industry and within the framework of labor legislation which had developed in that industry since 1888. However, by subsequently enacting section 40(k) of the Act, Congress made compliance with the Railway Labor Act a condition for holding a certificate of public convenience and necessity and, as a consequence, made the Board an enforcing agency of the Railway Labor Act insofar

[5] "The Board's experience and expertise is with transportation not labor relations problems." *Outland* v. *Civil Aeronautics Board*, 284 F. 2d 224, 228 (D.C. Cir. 1960).

as air carriers subject to the Act are concerned. Although Congress in that Act also gave the Board the prerogative to regulate the air transportation industry solely as required by the public interest objectives set out in section 102 of the Act, it did not by this legislation transfer the general regulation of labor-management relations in the industry to the Board. Although the Board is invested with plenary authority within its sphere, its competency is in the field of air transportation and not in the area of labor relations. It follows, therefore, that although not proscribed from regulating labor management relations in the industry, it should exercise extreme circumspection when acting within its sphere of authority over air transportation so as not to affect labor-management relations in a manner contrary to the national labor policy, unless, as in the correlated area of antitrust confliction, it finds its action is required "by a serious transportation need in order to secure important public benefits." In order to refrain from indirectly interfering with the national labor policy affecting air transportation embodied in the Railway Labor Act, it should accommodate its responsibilities under the Act to the provisions of the Railway Labor Act, if it is feasible to do so. [Footnotes omitted.]

This point was emphasized again later (40 C.A.B. at 614-615):

The Government's traditional passive role in the collective bargaining process is particularly applicable to the Board since, under the Act, its authority over labor management relations in the air transporta-

> tion industry is incomplete, being limited to the regulation of only one party, the carrier. In addition to the statutory limitation of its authority, the Board and the courts have recognized that the competency of the Board lies in air transportation and not in the labor-management relations area. In the opinion of the examiner, a policy decision curtailing the use by air carriers of an economic weapon not invalid under the national labor policy, in the absence of a manifest substantial "need," would be an improvident exercise of discretion. * * * [Footnote omitted.] [6]

Accordingly, the Board must heed the national labor policy, and it must accommodate the objectives of the Federal Aviation Act to the purposes of the national labor policy. The Board cannot properly take action derogating from the national labor policy unless required by a serious transportation need.

Agreement and National Labor Policy

The Carrier Parties declare that the Agreement is sanctioned by national labor policy, which permits the parties to a major labor dispute to resort to self-help in settling their differences once the procedures of the Railway Labor Act have been exhausted. The Carrier Parties urge that the government is forbidden to interfere with the bargaining tactics used by the parties to the collective bargaining process unless such tactics are independently illegal. It is their position that mutual employer financial assistance is within the ambit of permitted activity in labor disputes.

ALPA challenges the position of the Carrier Parties. It contends that the Agreement, as applied to ALPA, is not

[6] See also 40 C.A.B. at 562.

reconcilable with the limitations of national labor policy and the Railway Labor Act on multi-employer economic activity against employees. ALPA also maintains that the Agreement does not constitute proper carrier self-help under the Railway Labor Act because carriers subject to that Act must limit their responses to a strike on an *ad hoc* basis in accordance with the particular situation.

The previous Board decisions did not conclude that the Agreement is inconsistent with national labor policy or the Railway Labor Act. None of ALPA's arguments persuade the Examiner that a different result should obtain now.

In support of the position that the Agreement cannot properly be applied to it, ALPA asserts that (1) multi-employer economic measures against employees are limited to multi-employer bargaining units, and (2) multi-employer economic action to protect multi-employer bargaining units can be invoked only when the multi-employer bargaining units are confronted with activity directed at their common front or integrity, citing *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87 (1957), known as the "Buffalo Linen" case, *Labor Board* v. *Brown*, 380 U.S. 278 (1965), and *New York Mailers' U. Number Six, Inter. Typo. U.* v. *N.L.R.B.*, 327 F. 2d 292 (2nd Cir. 1964). These cases do not sustain ALPA's position.

All of the cases cited by ALPA involved lockouts of their employees by employers joined in multi-employer bargaining associations. In every case, the charge that such self-help violated the National Labor Relations Act was rejected by the Court. Nevertheless, in substance, ALPA argues that because these cases involved multi-employer bargaining associations a different conclusion would prevail with respect to the Agreement inasmuch as the carriers do not bargain collectively with ALPA. The Examiner finds noth-

ing in these cases which supports ALPA's argument. Indeed, the *Buffalo Linen* case was cited by the Board in its 1964 Board opinion in buttressing the conclusion that the Agreement represents legitimate self-help.[7]

In any event, *Kennedy* v. *Long Island Railroad Company*, 211 F. Supp. 478 (S.D. N.Y. 1962), *aff'd.*, 319 F. 2d 366 (2nd Cir. 1963), *cert. denied*, 375 U.S. 830 (1963), disposes of ALPA's position. That case involved a strike insurance plan among railroads quite similar to the Agreement. The Brotherhood of Railroad Trainmen (BRT) had struck the Long Island Railroad Company, and the latter received assistance under the strike insurance plan. Subsequently, BRT and its officers filed a suit for money damages against the Long Island, 22 other railroads, the Association of American Railroads, and a bank alleging that the strike was the proximate result of the strike insurance and that the strike insurance arrangement violated the Railway Labor Act, the Interstate Commerce Act, the Sherman Act, and was tortious under New York law. The complaint was dismissed, and the strike insurance plan was held lawful. Thus, this case upheld the legality of multi-employer mutual aid where a single union went on strike against an individual railroad.

ALPA argues that the *Kennedy* case does not incorporate limitations on multi-carrier activity different from the cases previously discussed. To support this position, it quotes the following statement from the court's opinion (211 F. Supp. at 488):

> Multicarrier bargaining of labor demands, referred to as regional and national handling, has been and

[7] 40 C.A.B. at 607, n. 29. Nor is *N.L.R.B.* v. *Milk Drivers & Dairy Emp. Local Union No. 584*, 341 F. 2d 29 (2nd Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), also cited by ALPA, apposite.

> is (since the Act) the customary method of collective bargaining.

ALPA also asserts that it does not appear from the court's opinion that any argument was raised to the effect that the railroad insurance plan could not be applied to situations involving single-carrier bargaining.

At the outset, it should be noted that ALPA's entire argument is predicated on a spurious premise. For, as the Examiner has discussed, the cases cited by ALPA do not place limitations on multi-carrier self-help activity.

Moreover, ALPA's contentions do not square with the court's opinion in the *Kennedy* case. The statement quoted by ALPA from the *Kennedy* case was made in the course of a discussion in which the court rebuffed plaintiffs' contention that the strike insurance plan violated the Railway Labor Act by introducing an element of multi-party bargaining without the plaintiffs' consent. The essential point made by the court is that plaintiffs erred in their assumption that the Long Island, by receiving strike benefits to which other railroads had contributed, was being financed to represent an industry-wide point of view and the interests of others instead of only its own interests vis-a-vis plaintiffs. Clearly the situation concerned single-union and single-carrier collective bargaining, and, in that context, the court sustained the program of mutual aid among the carriers.

ALPA further contends that the *Florida East Coast Railway* cases[8] establish that carriers subject to the Rail-

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[8] *Florida E.C. Ry. Co.* v. *Brotherhood of R. Trainmen*, 336 F. 2d 172 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965); *Florida East Coast Railway Company* v. *United States*, 348 F. 2d 682 (5th Cir. 1965), *affd., sub nom., Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238 (1966).

way Labor Act and faced with a strike may not take whatever economic action is thought necessary by management but must limit their response on an *ad hoc* basis in accordance with the particular situation at hand.

These cases in no way detract from the validity of the Agreement in light of national labor policy. They did not involve the question of the nature of the self-help to which a carrier could resort when the processes of the Railway Labor Act had in all respects been exhausted or the strike was illegal. Rather, the cases concerned a situation where the railroad, suffering a lawful strike, unilaterally changed existing collective bargaining agreements without pursuing the steps required by the Railway Labor Act. The courts held that even in these circumstances the railroad could turn to self-help in order to fulfill its obligation to operate, but, with regard to matters still subject to the procedures of the Railway Labor Act, such self-help was restricted to measures reasonably required to conduct operations.[9]

The Examiner concludes that the Agreement is fully consonant with national labor policy. Furthermore, the application to renew the approval of the Agreement must be granted unless such action would conflict with the provisions, or defeat the purposes, of the Federal Aviation Act.

Public Interest Considerations

It is appropriate now to view the Agreement in light of the public interest standard of section 412 of the Federal Aviation Act.

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[9] It was left with the United States District Court Judge to pass on the changes necessary to continue operations. Compare with *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

Stability of Airlines

The promotion, encouragement, and development of air transportation are cardinal objectives of the Federal Aviation Act. The Agreement advances these aims by shoring up airline stability.

In its last opinion, the Board found (40 C.A.B. at 561):

> Air carriers are particularly vulnerable to strikes, and the industry has, in the recent past, been plagued by strikes. The Pact [Agreement] offers, at a not unreasonable cost for the protection obtained, a substantial measure of relief against the costs of strikes, in this fashion and to this extent contributing to industry stability.

Developments since the prior proceeding further support the contribution of the Agreement to airline stability.

There have been two major strikes against parties to the Agreement since the last proceeding. In 1965, ALPA was on strike against Pan American for ten days. In 1966, IAM struck four parties to the Agreement (Eastern, Northwest, TWA, and United) and National Airlines, Inc.,[19] for 43 days.

The loss to Pan American during the period of the ALPA strike amounted to $5,848,000. Mutual aid covered approximately 59 percent of this loss, so that the net strike loss was $2,412,000 before taxes. In addition, as a consequence of the strike, Pan American's post-strike losses, for which no mutual aid is available, constituted an estimated $2 million.

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[19] National became a party to the Agreement on March 11, 1960, but withdrew effective December 31, 1961.

Opinion

The 1966 IAM strike produced strike-period losses for parties to the Agreement as follows (in millions):

	Eastern	*Northwest*	*TWA*	*United*	*Total*
Loss	$26,079	$17,008	$58,600	$61,131	$162,818
Less: Mutual Aid	7,667	2,492	17,962	17,943	46,064
Net Strike Loss	$18,412	$14,516	$40,638	$43,188	$116,754

The heavy, adverse effect of the strike is evident from the foregoing data.[11] But mutual aid did serve to soften the losses by approximately 28 percent.[12]

The evidence demonstrates that the Carrier Parties currently need financial stability and that such a need will continue into the future. Over the five-year period 1963 through 1967, the rate of return on investment of the Carrier Parties, excluding the tax savings resulting from investment tax credits, ranged from 6.1 percent in 1963 to 11.4 percent in 1965.[13] For 1967, the rate was 7.6 percent. These percentages may be compared with the average of 10.5 percent found by the Board in the *General Passenger-Fare Investigation*, 32 C.A.B. 291, 308-309, 331 (1960), to be a fair and reasonable rate of return, albeit

[11] From the inception of mutual aid to the present, there have been 20 strikes on carriers party to the Agreement which involved the payment of mutual aid. The losses for the periods of the strikes totaled $247 million before mutual aid, mutual aid payments amounted to $82 million, and the net strike losses before income taxes comprised $165 million.

[12] The Carrier Parties did not furnish the savings in income taxes flowing from the losses.

[13] The rate of return for 1966 was 9.8 percent. The Carrier Parties estimated that if the 1966 IAM strike had not occurred the rate of return would have been 12.3 percent. If the investment tax credit were applied, all rates of return would be approximately one percentage point higher.

not a minimum return. Moreover, the long-term debt of the Carrier Parties doubled in the five-year period from 1963 through 1967, reaching $2.7 billion in the latter year, producing larger, fixed interest costs. In addition, projections show capital expenditures of $7.9 billion in the period 1968-1971. It appears, therefore, that the Carrier Parties fully need their existing financial resources and must develop even greater financial resources internally and externally, to meet their future capital and operating requirements. The record, which goes back to 1946, shows no year strike free. This history signifies that steps to bolster the foundation of the airlines' financial capabilities are not unreasonable and are consistent with the public interest.

ALPA avers that there is no evidence that strikes have jeopardized the financial stability of the Carrier Parties. However, the mutual aid received by Eastern as a consequence of the 1962 FEIA strike was essential to maintain an acceptable cash position and avoid default under the working capital requirements of the loan agreements then in effect.

ALPA submits a number of other contentions directed at demonstrating that the Agreement is no longer needed by the Carrier Parties, at least in regard to the pilots. These contentions concern favorable changes for the industry over the decade since 1958, improvements in labor relations, other avenues of support available to the carriers, and the lack of comparability between pilot strike benefits and assistance pursuant to the Agreement.

Regarding favorable changes in the industry, ALPA points out that the airlines have virtually completed upgrading to jet fleets. This does not mean, however, that the airlines will enjoy problem-free days in the future. The

integration of the Boeing 747 and like aircraft, the operation of supersonic aircraft, and the introduction of other aircraft as yet unknown, no doubt will confront the airlines with sizeable problems, both with respect to operations and financially.

ALPA claims the Carrier Parties have improved financially and expect continued growth. Judgments as to airline financial status at any given point of time are not dependable. A fundamental aspect of the airline industry is the cyclical nature of its earnings. *General Passenger-Fare Investigation*, 32 C.A.B. 291, 328 (1960); *General Passenger-Fare Investigation*, 17 C.A.B. 230, 234-235 (1953). Moreover, the Board recently determined that higher fares for the industry are warranted. *Domestic Trunkline Carriers, Proposed Fare Increases*, Order 69-2-98, February 19, 1969. In any event, even if it were to be concluded that the Carrier Parties have improved financially, as already discussed sustained financial stability of the airlines is vital to continued growth and the Agreement affords some help in maintaining the necessary stability.

ALPA contends that the record does not establish that the Carrier Parties are increasingly or particularly vulnerable to strikes or that any decline in profits is attributable to pilot-carrier labor relations. ALPA points out that in 1965, when Pan American suffered a pilots' strike, the carrier's earnings were higher than in 1964.

Whether or not the Carrier Parties are increasingly or particularly vulnerable to strikes is of no great significance. The fact is that the Carrier Parties are vulnerable to strikes. Thus, there are immediate and direct losses during the period of a strike when revenues are lost while many expenses continue. In addition, anticipated profits are not

realized. Moreover, there are post-strike losses with revenues increasing more slowly than expenses. Furthermore, there is the real danger that traffic which transferred to a competing carrier during the course of a strike will remain with that carrier. The Agreement plays a part in ameliorating such problems. With regard to the 1965 strike against Pan American, manifestly, the carrier's profits in 1965 would have been larger but for the losses suffered by it during the ALPA strike.

Accepting the proposition submitted by ALPA that pilot-management relations in the industry have improved in no way justifies denial of the application. The improvement in labor relations does not preclude pilots from going on strike if they consider such action warranted. Accordingly, it is not inconceivable that at some future time the Carrier Parties may need to resort to the Agreement to secure a measure of relief against a strike by pilots.

ALPA urges that the Carrier Parties do not need the benefits of the Agreement because pilot no-strike agreements covering military flight operations provide additional strength to the carriers and Board exemption orders during major labor disputes maximize windfall benefits to struck carriers.

As the Board made clear in its initial opinion on mutual aid, allegations concerning relative employee-employer bargaining powers must be disregarded "unless the asserted imbalance in labor-management relations poses a threat to the development of a stable and efficient air transportation system." 29 C.A.B. at 173. Certainly, even when considered with the factors noted by ALPA, the Agreement does not cause such an imbalance. Thus, despite the availability of military contract revenues,[14] the issuance of

[14] See Appendix B.

exemptions by the Board broadening the operations permitted non-struck carriers,[15] and mutual aid, in 1966 the Carrier Parties still suffered the large strike losses previously set forth (see p. 19, *supra.*).

The contention that there is a lack of comparability between pilot strike benefits and assistance under the Agreement must also be cast aside for reasons indicated in the preceding paragraph. [16] Moreover, there is no evidence that the pilots have suffered through any disadvantage in bargaining power. Despite the existence and application of the Agreement, pilots' wages have increased substantially and they have gained improved working conditions and enhanced fringe benefits through the collective bargaining process.

Labor Relations

The Six Unions allege that the Agreement has brought increased labor strife and interruptions to interstate air commerce. They contend that since the Agreement has been in effect there has been an average yearly increase of 1.2 strikes, or approximately 35 percent, in the airline industry and the average length of the strikes has risen by approximately 15 percent. Moreover, they assert that in the period from the last Board approval of the Agreement through 1967 there has been a similar increase in the number of

[15] See, for example, *Emergency Air Transportation Requirements*, Order E-23928, July 9, 1966. The record does not indicate the effect of the exemption orders on the Carrier Parties. Of course, there is no way of foretelling whether any future strike would move the Board to issue similar exemption orders. No such order was issued in connection with the pilots' strike against Pan American in 1965.

[16] In any event, before a meaningful comparison could be made, it would be necessary to introduce into the record evidence (now absent) showing the financial resources of the individual pilots as well as their financial obligations.

strikes and the average length of each strike as compared with the pre-Agreement period. The Six Unions claim that even if strikes growing out of the crew complement issue were eliminated there would be an increase over the pre-Agreement period in the number of strikes and a substantial increase in their average length.

In the last proceeding, the Board rejected this statistical approach of imputing increased labor strife to the Agreement. The Board said (40 C.A.B. at 562-563):

> The unions claim * * *: "Once the record demonstrates that there has been an aggravation of labor disputes and an increase in labor strife within the air transport industry under the Pact, it is submitted that there is a prima facie case that the Pact violates the public interest and that the burden then rests upon the carrier parties to demonstrate that this increase in labor strife cannot be attributed to the Pact."
>
> In our opinion the bare fact that there may have been a deterioration in labor-management relations during the period of operation of the Pact covered by the record does not raise a presumption that the deterioration was caused by the Pact, and such fact, standing alone, does not make out a "prima facie case" that the Pact violates the public interest.

Furthermore, the data persuade the Examiner that the Agreement has not led to increased labor strife. If there is any significance in the data advanced by the Six Unions, it lies in comparing strikes against parties to the Agreement (*i.e.*, an air carrier which was a party to the Agreement at the time it suffered the strike) with strikes against other

air carriers. Such a comparison discloses no important difference in the number of strikes or their duration.

Since the Agreement has been in operation, the number of strikes, the number of days flight operations were halted, and the average number of days flight operations were shut down per strike, have been as follows:

	Parties to Agreement[17]	*Other Air Carriers*[18]	*Total*
Strikes	25	20	45
Days Flight Operations Halted	707	586	1,293
Average Days per Strike	28	29	29

An analysis of strikes since the last decision of the Board approving mutual aid yields the following data:

	Parties to Agreement	*Other Air Carriers*	*Total*
Strikes	6	9	15
Days Flight Operations Halted	183	250	433
Average Days per Strike	31	28	29

Because the 1966 IAM strike possessed singular aspects (discussed *infra*, pp. 34-37), the results of eliminating that strike from consideration are noteworthy. With respect to strikes since the Agreement went into effect, the data are as follows:

	Parties to Agreement	*Other Air Carriers*	*Total*
Strikes	21	19	40
Days Flight Operations Halted	535	543	1,078
Average Days per Strike	25	29	27

[17] See Appendix C.

[18] See Appendix D.

Since the last Board decision on mutual aid the data are:

	Parties to Agreement	*Other Air Carriers*	*Total*
Strikes	2	8	10
Days Flight Operations Halted	11	207	218
Average Days per Strike	6	26	22

In view of the foregoing, extended comment is unnecessary on the Six Unions' claim that eliminating strikes attributable to the crew complement issue would not yield a different result. However, it is noteworthy that in the prior proceeding the Board found that "the controversy between two unions over jurisdictional representation of flight crew members has been the primary cause of labor-management disputes, at least since 1958." 40 C.A.B. at 563.[19]

Moreover, the emphasis placed by the Six Unions on the number and length of strikes ignores the fact that in the period 1958-1968 the Carrier Parties to this proceeding negotiated 221 labor contracts. In addition, in the last six years, Pan American, TWA, and United have reached a total of six agreements providing for arbitration of unresolved issues in major disputes. The large number of negotiated settlements without recourse to strikes is further evidence that the Agreement is not an impediment to labor peace.

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[19] Appendix E contains a list of strikes involving carriers party to the Agreement, indicating those ascribable to the crew complement controversy, as taken from the initial brief of the Six Unions. The Six Unions have not attributed to the crew complement controversy certain strikes which the Board found did stem from that controversy. These are the American and Eastern strikes in 1958 (40 C.A.B. at 620), strikes against Northwest and Pan American in 1960 (*Id.* at 621), and a strike against Pan American in 1962 (*Id.* at 624). Furthermore, National was not a party to the Agreement at the times it suffered strikes in 1964 and 1966.

The Six Unions also maintain that the Agreement has created mistrust in the minds of employees and serves as an irritant to the employer-employee relationship in the industry. The airline coordinator for IAM testified that union members term the Agreement a "strike breaking" arrangement.[20] ALPA argues that the mere risk that the Agreement will lead to an otherwise unnecessary work stoppage is sufficient to deny renewal.

The Agreement cannot properly be disapproved on the basis of subjective factors such as mistrust in the minds of employees. With regard to ALPA's contention, if there should be an unnecessary work stoppage, the employees would be the ones to embark upon such a maneuver. If substantial weight were given to these contentions, the logical extension would call for stripping the air carriers of all means of self-help. It would be manifestly unfair to confine the resources for self-help available to air carriers when the Board has no jurisdiction over the unions and cannot regulate the weapons of self-help they might use. Moreover, the Board would be unwarranted in taking such a step, *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 490 (1960), unless justified by its duties pursuant to the Federal Aviation Act.

From an objective point of view, the evidence does not show that the Agreement has had any important effect on labor-management relations. Two union representatives testified. The testimony of the IAM witness and other evidence establish that the union makes its proposals on the basis of what it believes its members are entitled to earn and that the Agreement has not deterred the union from battling for and gaining its objectives. The testimony of the

[20] Certain characterizations in the introductory clauses of the Agreement are ill-suited for facilitating labor-management relations.

ALPA witness reveals that, despite the existence of the Agreement, the pilots and carrier management have been able to settle their differences in recent years based on mutual trust. Moreover, the witness recognized that most contract negotiations in the industry during the past decade had concluded with agreements reached in the absence of strikes or lockouts and declared that this was "due to a problem solving atmosphere taken by both the management and the unions themselves." (Tr. 431). He anticipates labor peace, as far as the pilots are concerned, for the foreseeable future unless the carriers should attempt to make fundamental changes in existing collective bargaining agreements. In the opinion of this witness, the Agreement had no effect on the resolution of the crew complement issue which plagued the industry in the early days of jet operations. He also indicates that the Agreement has had little impact on the formulation of the issues by the parties to collective bargaining or on the solution of the issues.

From the carriers' standpoint, the evidence also shows that the Agreement does not play a role in the development of carrier bargaining positions or during the negotiating process. It is only at the point a strike appears imminent that the carriers give consideration to the Agreement in deciding whether to suffer the strike.

The evidence establishes, therefore, that the Agreement has had little, if any, impact on labor-management relations.

The Six Unions state that the basic test of the impact of the Agreement upon the public interest is the Agreement's success in avoiding or reducing the number and length of strikes which occur. Similarly, ALPA contends that the record does not indicate that the Agreement has contributed to improvements in labor relations.

However, to gain approval under section 412 of the Federal Aviation Act, the Agreement need not have a favorable bearing on labor relations as long as it does not exacerbate labor relations to the extent of impeding attainment of the objectives of section 102 of the Act. Thus, as pointed out by the Board when it first approved mutual aid, the question is only "whether the agreement threatens, by aggravation of labor disputes, to hinder achievement of the objectives set forth in section 102 of the Federal Aviation Act." 29 C.A.B. at 173. Accordingly, the contentions of the Six Unions and ALPA must be rejected.

Collective Bargaining Process

An integral part of the subject of the preceding section is the question of the effect of the Agreement on the collective bargaining process. Consequently, much of the discussion in the preceding section applies here also. Some additional comment is appropriate, however.

To show the effect of the Agreement on the collective bargaining process, the Six Unions assert that the Agreement was a contributing factor to IAM's position during the 1966 negotiations. In support, they rely on direct testimony of the IAM airline coordinator as follows (Tr. 539-540):

> Q. In your opinion, did the Mutual Aid Pact have any effect upon the IAM position during the negotiations?
>
> A. Well, I think it was one of the contributing factors. I think that due to the reluctance on the part of the carriers to make any type of an offer for such a long extended period of time, and then following an emergency board report which they reluctantly said, "We will agree that," that they did

> not make a proposal that in my opinion they knew they were going to eventually have to make to avoid the strike. It was quite obvious to me that the Mutual Aid assistance that they would receive from non struck carriers played a very prominent part in it.

The testimony does not indicate that IAM changed its bargaining position in any respect because of the Agreement. Rather, the testimony shows that IAM determined to strike against the carriers because the latter failed to submit a proposal satisfactory to IAM.[21]

If there is any doubt on this score, it should be eliminated by the following testimony of the witness on cross-examination by counsel for the Carrier Parties (Tr. 565-566):

> Q. One other question I wanted to ask you: Does the existence of the mutual aid agreement have any effect on the demands served by IAM on airline members to the agreement?
>
> A. On the demands that we are proposing?
>
> Q. Either at this time or any negotiation?
>
> A. No, I don't say they have. We make proposals based upon what we think the members are entitled to. The question as far as mutual aid is concerned is the deterrent that it represents to keep us from getting those things.
>
> Q. Do you figure it is a deterrent to your achieving your demands?
>
> A. Definitely.

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[21] The absence of a suitable proposal from the carriers was attributed by the witness to their reliance on the support furnished under the Agreement.

ALPA contends that the Agreement functions to disrupt the collective bargaining process. The union claims that the objective of the Agreement is to change the relative positions of the parties in collective bargaining. ALPA concedes that the question of imbalance at the bargaining table is beyond the scope of the proceeding, but it maintains that the Board may consider the principal objective of the Agreement insofar as it negatively affects the collective bargaining process. To support its position, ALPA asserts that the Agreement has the effect of changing carrier bargaining attitudes and positions in the period immediately prior to announced strikes by lowering the cost of suffering a strike, decreasing the sense of urgency to reach agreement, and exaggerating open issues through the increase in carrier economic strength derived from the Agreement. ALPA argues that the objective of changing bargaining relationships through increased carrier economic strength is not based upon any legitimate business end and that the Agreement represents a carrier attempt to secure economic strength and a bargaining advantage without formal amendment of the Railway Labor Act. ALPA urges that the Agreement is unsuitable to relationships which must rely for their success on mutual confidence and respect and that it is a tax on those carriers which maintain a constructive relationship with their employees.

These contentions have been considered by the Board in the past proceedings and discarded. In its original decision on mutual aid, the Board rejected the contention that the Agreement would detract from the carriers' obligation under the Railway Labor Act to bargain in good faith and would interfere with the prompt settlement of disputes.[22]

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[22] The opinion of the Court of Appeals in the *Kennedy* case cites the 1959 Board decision as a "recent and authoritative decision" demonstrating that a mutual assistance agreement "quite similar to the strike insurance plan before us" is no impediment to good faith bargaining. 319 F. 2d at 372.

The Board pointed out that the substantial losses even with mutual aid plus possible permanent diversion of traffic to competing carriers were powerful incentives to avoid strikes. 29 C.A.B. at 171. On reconsideration, the Board further underlined the Congressional intent in the Railway Labor Act to permit the parties "to engage in reciprocal tests of economic strength within the framework of collective bargaining." 30 C.A.B. at 92. In the last proceeding it was found (40 C.A.B. at 628):

> There is no substantial evidence in the record that the Pact has had any material effect upon the collective bargaining process in the industry. Nor does the record indicate that the Pact has resulted in actions by the Pact members repugnant to the purposes and spirit of the Railway Labor Act.[76]

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[76]In fact, disregarding negotiations in which the jurisdictional flight crew controversy overrode the economic considerations, the record shows that the carriers have not experienced any difficulty in negotiating contracts with the air transport unions since 1958.

It also said (40 C.A.B. at 631):

> Although the supplemental payments provision, even as its liability is diminished by "windfall" payments, appears to be a costly form of insurance for a prudent management of a carrier with stabl. abor relations to underwrite, no one carrier is immune from labor difficulties and the exercise of management discretion in this respect is not subject to review in this proceeding. The overall effect of the agreement on the Pact members as a group appears minimal, although the effect on profits or losses of in-

dividual carriers may be severe. As an insurance arrangement it is economical, in that costs of administration are minimal, with no override such as would be payable in the case of commercial insurance, and no interest payable. Moreover, the carriers have not given a "blank check" to a member carrier to obligate them without limitation for strike losses. The limitation of liability in any one calendar year, based upon one-half of 1 percent of the adjusted air transport operating revenues for the prior calendar year, is keyed to a degree to the ability to pay and is not so large as to cause the paying carrier to get into financial difficulty from this expense alone. On the other hand, the agreement is of use only for brush fires and not holocausts since in the case of a single carrier strike involving one of the larger carriers, the maximum liability would be exhausted in 51 to 85 days, but in the event of simultaneous multicarrier strikes, such as the illegal strike of February 1961, the maximum payments would have been exhausted in 4.8 days.

The examiner's scrutiny of the financial provisions of the agreement does not confirm the Bureau's fear that the agreement financially is of such strength as to create an imbalance in bargaining positions adverse to the public interest objectives. The insurance provision is not attractive enough financially to cause the carriers to refrain from negotiating collective bargaining agreements in good faith or to invite unnecessary strikes for the purpose of presenting an industry position. While admittedly costly, the agreement does not impose a financial burden upon an individual carrier member which would affect its capability to fulfill its obligations under

> the Act, nor is the liability of the carriers as a group so great as to interfere with the development of a sound economic air transportation industry. [Footnote omitted.]

ALPA's contentions carry no more weight now than in the past, and the factual allegations are not sustained by the evidence developed at the hearing.

Furthermore, if the occasion should arise when the Carrier Parties employ the Agreement as a shield against good faith bargaining, the unions have recourse.

The Railway Labor Act, section 2, First, provides (45 U.S.C.A. § 152):

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Thus, if the carriers fail to bargain in good faith, they would violate that Act. Upon appropriate application, either the courts or the Board will require the carriers to bargain in good faith. *Ruby* v. *American Airlines, Inc.*, 329 F. 2d 11 (2nd Cir. 1964);[23] *Air Line Pilots* v. *Southern Airways, Enforcement*, 36 C.A.B. 430 (1962).[24]

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[23] Judgment vacated and case remanded to the District Court with direction to dismiss the complaint as moot, *sub nom.*, *O'Connell* v. *Manning*, 381 U.S. 277 (1965).

[24] Petition for review dismissed as moot, *sub nom.*, *Southern Pilots Association* v. *Civil Aeronautics Board*, 323 F. 2d 288 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 954 (1964).

Detriment to Carriers

The Six Unions aver that the Agreement is actually detrimental to the Carrier Parties because the Agreement provided the margin which persuaded the carriers to undergo the 1966 IAM strike and the strike cost the carriers a substantially greater sum than if they had accepted the original union demands.[25] They suggest that there is a substantial question whether the carriers intended to negotiate in good faith, noting that for those difficult negotiations the carriers appointed as a principal spokesman an individual who had no prior experience in labor relations under the Railway Labor Act. They further contend, to support this position, that the carriers did not make a proposal on the economic issues until the very end of the mediation sessions under the auspices of the National Mediation Board (NMB).

Plainly, it is in the interests of the carriers to avoid strikes. Any strike results in economic loss. Nevertheless, occasions arise when a carrier believes it is more in its interest to suffer a strike than to acede to union demands. The Six Unions would have the Board, on a hindsight basis, judge whether the carriers were wise to undergo the 1966 IAM strike.

It is unnecessary to enter into the murky atmosphere surrounding the contentions of the Six Unions, for the record

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[25] This contention takes into account the original union demands and the final settlement terms and also the strike losses suffered by the carriers as estimated in "Study of the Financial Impact on the Airline Industry of the IAM Strike," Civil Aeronautics Board, July 1967. Although there is a dispute between IAM and the Carrier Parties regarding the dollar values of the original union demands and the final settlement terms, the Six Unions have employed the Carrier Parties' estimates. On these bases, the Six Unions claim the carriers would have been better off in the amount of $74.7 million if they had accepted the original union proposal.

simply does not contain reliable and probative evidence to support the claim that the availability of mutual aid was the determinative factor in inducing the carriers to take the 1966 strike.

Significantly, one of the carriers struck was National, a carrier not a party to the Agreement. And IAM's airline coordinator made it clear that National was not a weak factor in the negotiating process.

The fact that the carriers' principal spokesman had no prior experience in labor relations under the Railway Labor Act lends little support to the Six Unions' position. The principal spokesman was not a neophyte in labor negotiations. He had had approximately ten years of experience in such negotiations pursuant to the National Labor Relations Act, and, in addition, the negotiating committee included expert carrier representatives.

Moreover, the carriers did attempt to reach a settlement prior to the strike. They made an offer during the course of mediation. Furthermore, following the failure of mediation efforts, the NMB profferred arbitration. The proposal was accepted by the carriers and refused by IAM. Later the carriers accepted the recommendations of an Emergency Board appointed by the President of the United States pursuant to section 10 of the Railway Labor Act as a basis for settlement, but IAM declined to submit the recommendations to its membership. The recommended settlement would have resulted in an average annual pay increase of 3.6 percent as compared with 3.2 percent in the President's Wage-Price Guidelines.

The real goal of IAM in this controversy appears to have superseded immediate objectives peculiar to the airline industry. Thus, IAM, with a total membership of approximately 1,025,000, only 68,000 of whom are employed in the

air transport industry, strove to demolish the President's Wage-Price Guidelines and succeeded in doing so.

The focus of IAM on the wage-price guidelines is plain from the statements of union leaders. In March 1966, an IAM vice president explained the union's refusal to accept the NMB's offer to arbitrate on the ground that arbitration would be detrimental to IAM members "considering the present atmosphere with so-called guide lines for wage agreements." Carrier Ex. 26, Att. B, p. 1. In a letter transmitting the ultimate contract terms to the membership for their assent, the president of the IAM declared that the agreement "destroys all existing wage and price guidelines now in existence; in fact, it completely shatters them for all unions." Carrier Ex. 26, Att. J, p. 2. Again, the president of IAM, in remarks made on January 23, 1968, before the Western Conference of the Brotherhood of Teamsters, said about the 1966 strike, "As a further result we broke the administration's attempt to limit worker's wages—though not management profits—through the so-called guidelines," and "It resulted in one of the best settlements we ever achieved in this industry—and it buried the Government's guide lines—forever, we trust." Carrier Ex. 26, Att. K, p. 2. Finally, at the opening of the 27th convention of the IAM on September 3, 1968, the president of the organization referred to past problems with Congress and the White House "especially when we broke the wage guide lines in the air transport strike of '66." Carrier Ex. 26, Att. L, p. 3.

In view of IAM's emphasis on destroying the President's Wage-Price Guidelines, it does not seem that the carriers could have avoided the 1966 strike unless they joined with IAM in a challenge to the guidelines.

Government Participation

ALPA submits that the Agreement adversely affects the collective bargaining process by encouraging and involving government participation through the Civil Aeronautics Board. According to ALPA, the Agreement improperly encourages the Carrier Parties to rely on Board action approving the Agreement for added economic strength.

Contentions regarding Board participation in labor disputes were raised in the last proceeding and found lacking in merit. 40 C.A.B. at 584-586. Here, ALPA takes the unusual approach that air carriers are not justified in entering into an arrangement which, because of the provisions of the Federal Aviation Act, requires Board approval and which, if approved, helps sustain the economic viability of the air carriers in the event their employees go on strike under the circumstances triggering the Agreement.

ALPA's position is ill-conceived. An administrative agency cannot deny relief on the ground that the applicant should not have entered into a transaction requiring approval by the agency. If it is undesirable for the Board to accredit the Agreement for the reasons advanced by ALPA, the Board should be relieved of jurisdiction over such agreements and thereby free the agreements from regulation by the Board. Furthermore, it is not inappropriate for air carriers to seek economic strengthening through Board action. The provisions of section 102 of the Federal Aviation Act make it clear that the Board has this very role to perform in its administration of the Act.

Conflict of Interest

Since the air transportation business affects the public interest, the Six Unions consider it essential that the airlines not be placed in a conflict-of-interest situation. The

record indicates that, at the point a Carrier Party is confronted with the likelihood of a strike, the carrier takes into account the assistance it can anticipate pursuant to the Agreement in reaching its decision whether or not to submit to the strike. Apparently it is the Six Unions' position that the Agreement thereby creates a conflict of interest in the conduct of labor-management relations by inserting an incentive derogating from the public interest in the continued operation of airline service through the minimizing of labor strife and strikes. The Six Unions deem it unimportant that the payments under the Agreement constitute only a portion of a struck carrier's losses; they believe the basic consideration is that the public interest in avoiding a strike is determined within a different financial framework under the Agreement than without the Agreement.

These contentions are without merit. If the theory of the Six Unions were given play, any means of self-help employed by air carriers would present a conflict-of-interest problem. But the national labor policy, as exemplified in the Railway Labor Act, does not require air carriers to assent to union demands and avoid interruptions of service. It only requires that the air carriers, and the unions, bargain in good faith and observe the provisions of the Railway Labor Act. If they cannot reach agreement after exhaustion of the procedures of that Act, the carriers and the unions may have recourse to self-help, which includes mutual assistance such as that afforded by the Agreement. *Kennedy* v. *Long Island Railroad, supra.* And where, as the record here establishes, the Agreement does not pose a threat to the development of a stable and efficient air transportation system, but instead enhances the attainment of such a system, the Agreement is not adverse to the public interest.

Railway Labor Act

Multi-Carrier Bargaining

ALPA contends that the Agreement functions to interpose carriers other than the bargaining carrier into a pending dispute and thereby provides a means for the carriers to impose multi-carrier negotiations on the pilots without regard to Railway Labor Act procedures. ALPA maintains it has at all relevant times bargained with the carriers on a single-carrier basis and it cannot be forced to bargain on a multi-carrier basis.

It is true that under the Railway Labor Act joint bargaining cannot be required of either the employees or the employers. But the Agreement does not thrust such bargaining on ALPA. The Board has twice found allegations of compulsory joint bargaining wanting, 29 C.A.B. at 172 and 40 C.A.B. at 601-609, and the same contention was rejected by the court in the *Kennedy case*, 211 F.Supp. at 488.

Nor does the record developed in the instant proceeding support ALPA's contentions. ALPA relies on testimony of its witness that during concurrent negotiations with Eastern and United the pilots found the proposals of the two carriers were identical on some issues. This hardly demonstrates that the Agreement compels multi-carrier bargaining. First, it appears that the issues on which the positions of the carriers coincided were limited in number. Second, there is no showing that the concurrence of position on the part of the airlines was in any way attributable to the Agreement. Third, it is not unreasonable or unlawful for the airlines to take a common position on a common issue. As the Board said when it first approved carrier mutual aid (29 C.A.B. at 172):

> It may well be, of course, that carriers have and under the agreement increasingly will consult with each other concerning labor questions of common concern. Such a practice, however, would not necessarily entail any sacrifice of each carrier's complete and exclusive control over its collective bargaining.

In addition, the testimony of the ALPA witness indicates that the issues were resolved differently on the two airlines. Finally, the IAM, which had a policy of favoring joint bargaining,[26] has receded from that policy and, pursuant to an IAM Air Transport Committee Report passed at the 1968 convention, now negotiates on a separate but coordinated basis. It is evident, therefore, that the Agreement does not compel joint bargaining.

Application of Agreement to Individual Unions

ALPA asks that, in the event the Agreement should otherwise be approved, such approval be made inapplicable to the pilots. APA seeks principally to avoid approval of the Agreement with respect to American.

ALPA's request is bottomed on the fact that pilot collective bargaining is conducted individually with each carrier by a committee of line pilots in the service of the airline involved, with ALPA home office assistance. ALPA contends that inter-union mutual assistance does not exist, that the future ALPA carrier labor relations picture is favorable, that there have been only two ALPA strikes against Carrier Parties since 1958, that the carrier financial resources far exceed those of ALPA, that no strike benefits have been paid by the pilots since 1963, that no benefits are paid for

[26] The 1966 IAM negotiations were handled on a joint bargaining basis at the request of IAM.

the first 30 days of a strike, and that such benefits as are available to striking pilots would not be sufficient to have any influence on collective bargaining.

These contentions do not convince the Examiner that it would be adverse to the public interest or in violation of the Act to allow the Agreement to go into effect with respect to the pilots. The *Kennedy* case, *supra*, establishes that a mutual assistance arrangement among carriers does not violate the Railway Labor Act in a major dispute between an individual union and an individual carrier. Furthermore, as was discussed earlier, it is not properly within the Board's province to deal with the relative bargaining powers of employers and employees unless there were such an imbalance as to threaten the development of a stable and efficient air transportation system. The record does not demonstrate any such imbalance.[27] Accordingly, ALPA's request is denied.

APA's position arises from the fact that it represents pilots only on American. The reasons justifying denial of ALPA's request warrant the same action with respect to APA.

Conditions

Period of Approval

In the last mutual aid proceeding, the Examiner approved the Agreement without a time limit, but the Board restricted the approval to three years. The Board predicated its action on the ground that the years since creation of the

[27] Even if the allegations of ALPA accurately represent the facts, the factors are subject to change regardless of whether the Agreement should be approved. Thus, inter-union assistance could develop, pilots represented by ALPA could increase their resort to strikes in the future, pilot financial resources could grow, and ALPA policies with respect to strike benefits could alter.

Agreement had not been typical for the industry, plagued with a capacity problem, or for labor-management relations, preoccupied with the crew complement issue.

The Bureau recommends that approval again be limited to a term of years, claiming that the same factors previously persuading the Board to place a time period on its approval are still outstanding. The Bureau asserts that the over-capacity problem has not been resolved and that the crew complement for the Boeing 737 and aircraft yet to be placed into service has not been settled. The Bureau suggests five years from July 1967 as a period consistent with the Board's prior temporary approval.

ALPA states that the pattern of improved labor relations between the parties can only be negatively affected by providing the carriers with indefinite assurance of the continuity of the Agreement.

The Six Unions, on the other hand, maintain that the Bureau's position avoids the problem. They urge that there will always be unique labor relations in the industry and that, if the impact of the Agreement in aggravating labor relations is sufficient to warrant its periodic reexamination, such reason also supports disapproval of the Agreement.

The Examiner does not believe temporary approval serves a useful purpose at this stage of the Agreement's existence. If throughout ten years of life for the Agreement industry conditions have not been typical and are not presently representative, it is likely that there is no such measure as a normal period for purposes of the Agreement. Moreover, after three proceedings, two of which have involved comprehensive evidentiary public hearings, it does not appear that there are any legal or factual issues of importance remaining for exploration.

The basic principles applicable in evaluating the Agreement have been established. Nothing significantly new in the nature of the evidence has been developed over the years; only the details of the bargaining between employees and employers and the context in which strikes were called have differed to some extent. If, as ALPA contends, the crew complement issue has been resolved and pilot-carrier labor peace is the prognosis for the future, there is even less reason to approve the Agreement for a temporary period. In the judgment of the Examiner it would be an undue burden on the parties and inconsistent with the proper dispatch of the Board's business to require the parties to participate in another proceeding at a prescribed time in the future.

Approval for an indefinite period does not mean that the Board would be powerless if circumstances should arise which call for reexamination of the Agreement. Section 412 of the Federal Aviation Act expressly authorizes the Board to disapprove agreements "whether or not previously approved by it" if the Board finds the Agreement to be adverse to the public interest or in violation of the Act. Accordingly, if justified by future events, the Board can take appropriate action.

Other Conditions

The prior approval by the Board was subject to several conditions none of which were in controversy in the instant proceeding. There are no changed circumstances which warrant modifying or omitting the conditions. Indeed, some of the conditions are necessary to aid the Board in keeping reasonable surveillance over the Agreement to ascertain whether action by the Board in regard to the Agreement may be required. Accordingly, all the conditions will be imposed again.

Opinion

Ultimate Findings

On the basis of the foregoing facts and considerations and all of the evidence of record,[28] it is found that the Mutual Aid Agreement is not adverse to the public interest or in violation of the Federal Aviation Act of 1958, as amended, and should be approved, subject to the following conditions:

1. The approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act;

2. The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

3. In accounting for the amounts due to others and the amounts due from others under the Agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the Agreement as may be reasonably required by the Director of the Board's Bureau of Operating Rights; and

4. Copies of all arbitrators' decisions and awards issued under this Agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

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[28] Contentions of the parties not discussed herein have been considered by the Examiner and do not alter the decision.

Appendix A

MUTUAL AID AGREEMENT, AS AMENDED

WITNESSETH:

WHEREAS, the parties are common carriers holding certificates of public convenience and necessity issued by the Civil Aeronautics Board (hereinafter called CAB) providing for the transportation by air of persons, property and mail; and

WHEREAS, the mutual interests of the parties call for the taking of all proper and lawful measures to bring about sound and reasonable economic conditions that will be of benefit to the air transport industry and to the public; and

WHEREAS, the parties and other airlines are facing or faced with the threat of extreme and unreasonable demands made by representatives of certain of the classes and crafts of their employees, as exemplified by the current dispute between certain of the parties and their maintenance and related employees, represented for the purpose of collective bargaining by the International Association of Machinists, AFL/CIO (hereinafter called IAM), a controversy in which IAM has rejected and shown an utter disregard for the recommendations of the Emergency Board 122 appointed by the President of the United States to investigate said dispute and has struck Capital Airlines and threatened to strike other carriers for their insistence upon substantial compliance with the terms of said recommendations, which action of the IAM tends to undermine the influence, position and integrity of such Board and is destructive of the collective bargaining process; and

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WHEREAS, it is in the public interest and the interest of the parties hereto that the recommendations of such Presidential Emergency Board created under the provisions of the Railway Labor Act be respected by the employers and employees whose dispute was heard by the Board;*

NOW, THEREFORE, the undersigned hereby agree:

1. (A) In the event any party suffers a strike, resulting in the shutdown of its flight operations, (i) which has been called for reasons which include the enforcement of demands in excess of or opposed to the recommendations of a board established by the President of the United States under section 10 of the Railway Labor Act and applicable to such party; or (ii) which has been called in the absence of the establishment of such a board or in case of the failure of such a board to make specific recommendations on the merits for the settlement of the issues in dispute, and the struck party has in all respects acted in compliance with the Railway Labor Act; or (iii) which has been called before the employees on strike shall have exhausted the procedures of the Railway Labor Act; or (iv) which is otherwise unlawful; then, in such event, each party will pay over to the party suffering the strike an amount equal to its increased revenues attributable to the strike during the term thereof, less applicable added direct expenses.

(B) A struck party (subject to the limitations prescribed below) shall be entitled to additional payments if the payments received under (A) are less than twenty-five percent of its normal air transport operating expenses for the flight operations shut down as a result of the strike (the

* This clause and the preceding clauses were in the original agreement dated October 20, 1958, and they have not been altered by subsequent amendments to the agreement.

amount produced by such twenty-five percent being hereinafter called the "standard amount"), such additional payments to be determined as follows:

(1) In the event the payments to a struck party under (A) shall be less than the standard amount, the other parties (whether or not they are obligated to make payments under (A)) shall make such additional payments to the struck party as may be necessary to bring the aggregate of the payments under (A) and (B) up to the standard amount, subject to the limitations contained in paragraphs (2) and (3) below.

(2) The additional payments required of each party under paragraph (1) above shall be in the proportion that such party's air transport operating revenue for the calendar year next prior to the year in which the strike occurs bears to the total of such revenue for all paying carriers, but no party shall be obligated to make additional payments with respect to any calendar year which exceed, in the aggregate, one-half of one percent of such party's air transport operating revenue for such prior calendar year.

(3) In any calendar year in which there are two or more struck parties entitled to payments under (B) and the limitation contained in paragraph (2) shall prevent any of such struck parties from receiving the standard amount, the aggregate amount of all additional payments for such year under (B) shall be redistributed between the struck parties on the basis described below. There shall be no redistribution of payments under (A).

The redistribution of additional payments under (B) shall be with the object that, to the extent possible, no one of the struck parties shall receive from the total of payments under (A) and (B) a lower percentage of the standard amount than is received by any of the other struck parties except when a lower percentage of the standard amount results from the principle that there will be no redistribution of payments under (A).

An example of redistribution of payments under (B) is set forth in Appendix I attached hereto.

(4) The redistribution referred to in paragraph (3) shall be made promptly from time to time whenever it appears that a party which has already received payments under (B) will attain a higher percentage of the standard amount than it will be entitled to thereunder.

(C) All strike payments shall be made monthly within ten days after the close of each calendar month, or at such more frequent intervals as may be agreed to by the parties, upon the basis of preliminary estimates subject to subsequent adjustment.

(D) For the purposes of the Agreement:

(1) A struck party's normal air transport operating expenses for each day for any operation shall be its average daily air transport operating expenses for such operation includable in Accounts 5100-7000 under the CAB's Uniform System of Accounts and Reports for twelve months of full operations immediately preceding the month in which the strike shall have started,

excluding added direct expenses applicable to increased revenues attributable to a strike as described in (A) above. A month in which a party's normal operations have for any reason been curtailed to an extent that substantially affects its air transport operating expenses shall not be regarded as a month of full operations.

(2) A party's air transport operating revenue shall include all payments such party has received under the Agreement, but shall not include the increased revenues attributable to any strike with respect to which such party shall have made payments under the Agreement.

(E) In the event of a dispute regarding the requirement to make or the right to receive payment, the dispute shall be referred to final and binding arbitration. Unless the parties involved otherwise agree within twenty days after receipt of the notice and demand for arbitration, the arbitrator shall be selected and the arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Judgment upon any award rendered hereunder may be entered in any court having jurisdiction.

2. Any other trunk air carrier holding a certificate of public convenience and necessity issued by the CAB may become a party to the Agreement by signing counterpart copies and forwarding such copies to each of the other parties and to the CAB for filing. Any such carrier which elects to become a party after March 15, 1962, however, shall be liable for all payments it would have had to make if it had been a party on and after January 1, 1962, less all payments

which it would have been entitled to receive with respect to such period, and the payments by other parties under Clause 1(B) above shall be recomputed accordingly; provided, however, that any such carrier that was not a party to this agreement at any time prior to January 1, 1962 may elect to become a party as provided above, or upon giving six months' notice to the other parties to the agreement and the Civil Aeronautics Board of its desire to become a party at the end of said six months, in which event no payments will be due to or from such joining carrier until the end of said six months, and it signs counterpart copies of this agreement for all the parties and files it with the Civil Aeronautics Board.

Other than as set-off against its liability upon becoming a party as stated above, such carrier shall not be entitled to payments which it would have received had it been a party to the Agreement.

3. This Agreement shall become effective immediately, shall be filed with the CAB, and shall continue in effect until December 31, 1962 and thereafter from year to year, but any party may withdraw effective as of December 31, 1962 or December 31 of any year thereafter by giving at least sixty days' written notice to the other parties and the CAB. Upon such withdrawal by any party, any other party may also withdraw effective as of December 31 of the same year by giving at least thirty days' written notice to the other parties and the CAB. A party that withdraws from the Agreement (at a time two or more other carriers continue) shall nevertheless thereafter remain obligated, for a period of twelve months following the month in which such withdrawal becomes effective, to make the payments required by the Agreement to the extent that such withdrawing

party, on or after January 1, 1962, has received the amounts under Clause 1(B) above in excess of payments made by such party under such Clause 1(B).

This amendment shall become effective immediately and shall be filed with the CAB. If this amendment shall be disapproved by the CAB, it shall terminate forthwith to the extent disapproved and payments made hereunder, to the extent that they are affected by the terms of such disapproval, shall become and be treated as obligations owing from the receiving party to the paying party.

Any party may withdraw from the Agreement in the event the CAB disapproves the Agreement in whole or in part, by so notifying each of the other parties and the CAB, within ten days after such disapproval.

Withdrawal under the preceding paragraph shall be subject to the conditions prescribed in the final sentence of Clause 3 of the Agreement.

IN WITNESS WHEREOF, the parties have signed this agreement as of the date first above written.

AMERICAN AIRLINES, INC.
BRANIFF AIRWAYS, INC.
EASTERN AIR LINES, INC.
NORTHWEST AIRLINES, INC.
PAN AMERICAN WORLD AIRWAYS, INC.
TRANS WORLD AIRLINES, INC.
UNITED AIR LINES, INC.

APPENDIX I

(a) Assume maximum amount payable under (B) is $10,000,000 because of limitation contained in paragraph (2).

(b) Assume one struck carrier receives virtually all of standard amount from payments under (A).

(000 omitted)

Carrier	Standard Amount	Payments Under (A)	Additional Payments Under (B)	Total of (A) and (B) Amount	Total of (A) and (B) % of Standard Amount	Additional Payments as Redistributed	Revised Total of (A) and (B) Amount	Revised Total of (A) and (B) % of Standard Amount
A	$ 5,000	$ 4,800	$ 200	$ 5,000	100%	-0-	$ 4,800	96 %
B	6,000	4,000	2,000	6,000	100%	$ 1,368	5,368	89.5%
C	3,000	2,000	1,000	3,000	100%	684	2,684	89.5%
D	10,000	1,000	6,800*	7,800	78%	7,948	8,948	89.5%
Total	$24,000	$11,800	$10,000	$21,800		$10,000	$21,800	

* Maximum amount payable under paragraph (2) is exhausted.

Appendix B

CARRIER PARTIES

1966 TOTAL AND MILITARY CONTRACT REVENUES

(000)

Carrier	Total	Military Contract	Pctge.
American	$ 727,712	$ 1,833	.3
Braniff	187,827	14,093	7.5
Eastern	500,989	—*	—
Northwest	311,319	37,259	12.0
Pan American	840,967	79,959	7.5
TWA	681,632	20,911	3.1
United	856,903	12,653	1.5
Total	$4,107,349	$166,708	4.1

* In 1967, Eastern had $7,044,000 in military contract revenues.

Source: Total Revenues, Six Unions Joint Rebuttal Exhibit No. 12; Military Contract Revenues, ALPA Exhibit 11.

Appendix C

STRIKES AGAINST PARTIES TO AGREEMENT

Carrier	Period	Flight Operations Halted (Days)
Capital	10-17 to 11-22-58	37
TWA	11-21 to 12- 7-58	16
Eastern	11-24-58 to 1- 1-59*	38
Eastern	11-24 to 12-15-58**	22
American	12-20-58 to 1-10-59	22
Continental	6-29 to 10-10-60	105
Eastern	6-11 to 6-22-60	11
Braniff	9-25 to 10- 5-60	10
Pan American	10- 1 to 10- 2-60	1
Northwest	10-11-60 to 2-24-61	137
American	2-18 to 2-24-61	7
TWA	2-18 to 2-24-61	7
Eastern	2-18 to 2-24-61	7
National	2-18 to 2-24-61	7
Pan American	2-18 to 2-24-67	7
National	5- 2 to 5- 7-61	6
Eastern	6-23 to 9-13-62	82
Pan American	6-23 to 6-24-62	1
United	8-20 to 8-21-63	1
Pan American	8-25 to 8-26-64	1
Pan American	3-31 to 4-10-65	10
Eastern	7- 8 to 8-19-66	43
Northwest	7- 8 to 8-19-66	43
TWA	7- 8 to 8-19-66	43
United	7- 8 to 8-19-66	43
		707

* FEIA.
** IAM.
Source: Carrier Exhibit No. 20.

Appendix D

STRIKES AGAINST CARRIERS NOT PARTY TO AGREEMENT SINCE INCEPTION OF AGREEMENT

Carrier	Period	Flight Operations Halted (Days)
West Coast	11-21 to 11-23-58	3
Lake Central	11-23 to 12- 5-58	13
Pacific	6- 5 to 6- 8-59	3
Southern	8- 1-59 to 6-30-61	65*
Flying Tiger	1-21 to 2-16-60	27
Mohawk	3-17 to 4- 3-60	18
Southern	6- 5-60 to 9- -62	117**
Flying Tiger	2-18 to 2-24-61	7
Western	2-18 to 5-11-61	82
Pacific	4-23-62	***
National	2-15 to 2-16-64	1
BOAC	11-27-64 to 1- 7-65	42
Trans Caribbean	12- 9 to 12-11-64	3
San Francisco & Oakland Helicopter	4- 3 to 4-11-66	8
National	7- 8 to 8-19-66	43
Pacific	11- 6 to 11-13-66	8
Mohawk	12- 9-66 to 1-30-67	54
West Coast	7- 3 to 7-10-67	8
Airlift	3- 1 to 3-24-67	24
Qantas	12- 8-67 to 2-18-68	60
		586

* Full operations resumed 10-5-59.

** Full operations resumed 9-30-60.

*** Four hours.

Source: Carrier Exhibit No. 20.

Appendix E

Six Unions' List of Strikes Involving Parties to the Mutual Aid Agreement

Carrier	Year	Number of Days on Strike
TWA	1958	16
Eastern	1958	38
Eastern	1958	22
American	1958	22
Continental	1960	105*
Eastern	1960	11
Braniff	1960	10
Pan American	1960	1
Northwest	1960	137
American	1961	7*
TWA	1961	7*
Eastern	1961	7*
National	1961	7*
Pan American	1961	7*
National	1961	6
Eastern	1962	82*
Pan American	1962	1
United	1963	1
National	1964	1
Pan American	1964	1
Pan American	1965	10
Eastern	1966	43
National	1966	43
Northwest	1966	43
TWA	1966	43
United	1966	43

* Attributed by the Six Unions to crew complement controversy. See comments, Initial Decision, p. 26, n. 19.
Source: Initial Brief of the Six Unions, pp. 18-19.

APPENDIX J

Airlines Mutual Aid Pact-Order Granting in Part Petition for Reconsideration and Remanding for Further Hearing

Order 70-11-110 (November 23, 1970)

Opinion

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C. on
the 23rd day of November, 1970

Docket 9977
(70-11-110)
Agreement CAB 21445

AIRLINES MUTUAL AID PACT

ORDER GRANTING IN PART PETITION FOR RECONSIDERATION AND REMANDING FOR FURTHER HEARING

In Order 70-7-114 dated July 23, 1970, the Board approved the Mutual Aid Agreement in the form considered by the examiner. In addition, it approved an amended agreement which was entered into on October 31, 1969, subsequent to the issuance of the initial decision, and filed with the Board on February 5, 1970.

The Six Union Parties[1] have filed a petition for reconsideration and the Carrier Parties[2] have filed an answer.

The Six Union Parties request the Board to reconsider Order 70-7-114 and upon such reconsideration to (1) re-

[1] The Air Line Dispatchers Association, the Brotherhood of Railway and Steamship Clerks, the Communication Workers of America, the Flight Engineers International Association of Machinists and Aerospace Workers, and the Transport Workers Union of America.

[2] The original seven carrier parties to the proceeding are American Airlines, Braniff Airways, Eastern Air Lines, Northwest Airlines, Pan American World Airways, Trans World Airlines, and United Air Lines. Pursuant to amendments to the Agreement adopted as of October 31, 1969, Continental Air Lines, National Airlines, and Western Air Lines have joined.

open the proceeding to take evidence on the amended agreement or (2) disapprove the amended agreement. *Inter alia*, they assert that the substantial amendments made to the agreement[3] following the close of the evidentiary hearing and the coincidence of two subsequent labor disputes involving National and Northwest raise serious problems with respect to the relationship between the amended agreement and its impact upon the stability of labor relations in the air transport industry.

The Carrier Parties contend, *inter alia*, that the Board is not required to hold a hearing in light of the extensive evidentiary proceedings in the past on this type of agreement, that the recent amendments do not alter the agreement in material respects, and that no facts are alleged to show that the existence of the amended agreement resulted in consequences contrary to the public interest in connection with the aforementioned two strikes.

We are not presently persuaded that our earlier determination was in error. However, in fairness to the parties and to ourselves, we believe that we should reserve making a final judgment in this important matter until we have before us a fully developed record on the current facts, with all parties afforded an opportunity to present their evidence and arguments and to be fairly judged on that evidence and these arguments. See, *e.g.*, *Retail Stores Employees Union*,

[3] The amendments increased the level of supplemental payments (over and above the "windfall" payments) from 25 percent of normal operating expenses for operations shut down by a strike to 50 percent of such carrier's expense during the first two weeks of the strike, 45 percent for the third week, 40 percent for the fourth week, and 35 percent for any period thereafter. The amended agreement also increased the annual maximum liability of any carrier for supplemental payments from one-half to one percent of its air transport operating revenue for the previous calendar year. In addition, the new agreement eased the conditions of entry to permit any trunk carrier to join the agreement by November 15, 1969, without a waiting period or back payment.

et al. v. *F.C.C.*, U.S. App. D.C. , F. 2d , (No. 22,605, October 27, 1970) (Slip opinion at 11). Accordingly, we will remand the matter for the taking of further evidence with respect to the amended agreement on events which occurred since the close of the earlier hearing.[4]

ACCORDINGLY, IT IS ORDERED THAT:

1. Order 70-7-114 dated July 23, 1970, is vacated to the extent that it approved the amended agreement.

2. This proceeding be and it hereby is remanded to the examiner for further evidentiary hearing in accordance with the views expressed herein.

3. Except to the extent granted herein, the petition for reconsideration of the Six Union Parties is hereby denied.

By the Civil Aeronautics Board:

HARRY J. ZINK
Secretary

(SEAL)

[4] *Inter alia*, the Board desires evidence as to the agreement's role, if any, in affecting the bargaining balance between labor and management in the air transportation industry. In addition, in the event that we reach a different ultimate conclusion on the merits of the amended agreement, we will nevertheless give consideration to whether our action should be prospective only.

Opinion

MEMBERS MINETTI AND MURPHY CONCURRING:

We concur in the remand for the reasons set forth in our dissent to Order 70-7-114 as well as the additional matters subsequently raised by the petitioners.

Vice Chairman Gillilland Filed the Attached Concurrence.

GILLILLAND, VICE CHAIRMAN, CONCURRING:

As pertaining to the reasons stated by the Board for its decision, which, in a sense became the law of the case, the Union Parties have, I believe, the better of it on their requests for remand. Accordingly, I vote to remand.

However, there is another and to me more persuasive reason for not overturning the agreement than those stated. It appears to be clearly established that strike insurance is not *per se* unlawful. Furthermore, it is readily acknowledged that if the insurers were other than air carriers the Board would have no jurisdiction. It follows that if the carriers had chosen to make similar agreements with U. S. Steel or the Great Atlantic and Pacific Tea Company the matter would be beyond the reach of the Board. Consequently it seems to me that the mere fact the carriers have found that they can make a better contract by insuring each other, and have chosen to do so, is no more than a circumstance not justifying the Board's intrusion.

Although I am aware of the precedents and have participated in some of the earlier cases, I am inclined to regard this as one of the Board's gratuitous time consuming involvements, tending to confuse but not dispose, and from which, for the good of everybody, it should be drawing away.

APPENDIX K

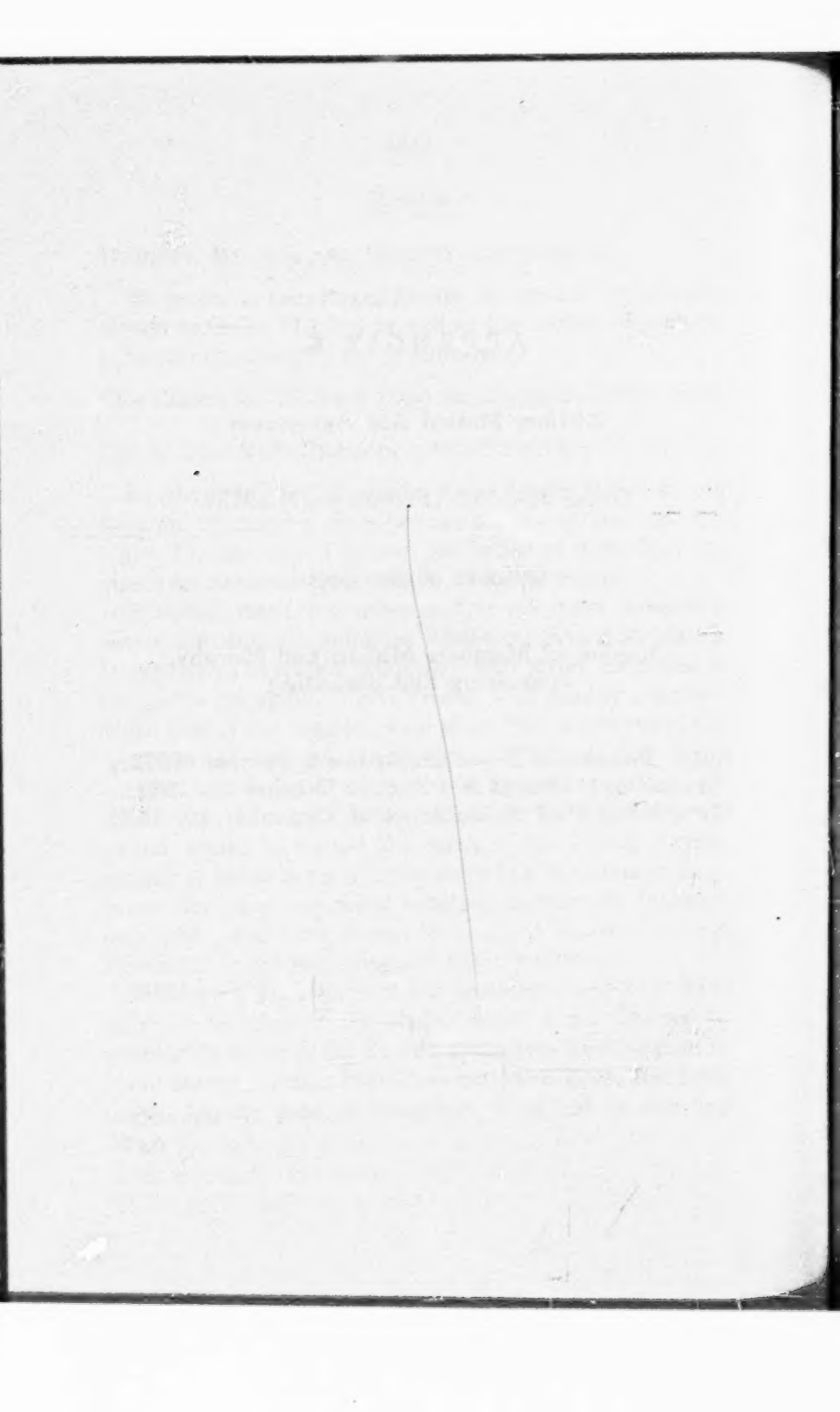
Airlines Mutual Aid Agreement

Order 73-2-110 (February 27, 1973)

Opinion of the Board

Opinion of Members Minetti and Murphy, concurring and dissenting

Initial Decision of Examiner Arthur S. Present (1972), including: Mutual Aid Pact of October 31, 1969 Mutual Aid Pact Amendment of December 10, 1970



Opinion

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket 9977
(73-2-110)

AIRLINES MUTUAL AID AGREEMENT

Agreement CAB 21445, as amended

Decided: February 27, 1973

The Mutual Aid Agreement, as amended, is found not to be adverse to the public interest or in violation of the Act, and is approved, for a period of five years, subject to conditions.

APPEARANCES:

CHARLES MILLER, RUSSELL CARPENTER and ROBERT SAYLER for American Airlines, Inc.; Braniff Airways, Inc.; Continental Air Lines, Inc.; Eastern Air Lines, Inc.; National Airlines, Inc.; Northwest Airlines, Inc.; Pan American World Airways, Inc.; Trans World Airlines, Inc.; United Air Lines, Inc.; and Western Air Lines, Inc.

RAYMOND J. RASENBERGER and WARREN C. NIGHSWANDER for Hughes Air Corp. d/b/a Air West; Frontier Airlines, Inc.; Mohawk Airlines, Inc.; North Central Airlines, Inc.; Ozark Air Lines, Inc.; Piedmont Aviation, Inc.; and Texas International Airlines, Inc.

JAMES L. HIGHSAW, JR. and WILLIAM G. MAHONEY for Air Line Dispatchers Association; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes; Communication Workers of

America; Flight Engineers International Association; International Association of Machinists and Aerospace Workers; and Transport Workers Union of America.

ROBERT S. SAVELSON for Air Line Pilots Association, International.

MARTIN SEHAM and FRED C. KLEIN for the Aircraft Mechanics Fraternal Association, Locals 24 and 32, and the Allied Pilots Association.

WILLIAM A. KUTZKE for the Department of Transportation.

NATHANIEL B. BREED, JR., and ALEXANDER N. ARGERAKIS for the Bureau of Operating Rights, Civil Aeronautics Board.

Opinion

BY THE BOARD:

In this proceeding we are once again considering the Airlines Mutual Aid Agreement, and particularly certain amendments, effective October 1969 and January 1971, which provide respectively for increased guaranteed payments to struck carriers and participation of the local service carriers.

The Mutual Aid Agreement was first instituted by six trunkline carriers in October 1958, and was approved by the Board for a one-year period.[1] It provided solely for so-called "windfall" payments by participating carriers to a carrier suffering a strike. Payments were authorized only for strikes in support of union demands in excess of the recommendations of a Presidential Emergency Board ap-

[1] Six-Carrier Mutual Aid Pact, 29 CAB 168 (1959).

pointed under the Railway Labor Act, which were called before union exhaustion of the Railway Labor Act pre-strike procedures, or which were otherwise unlawful. The "windfall" payments constituted payments equivalent to the increased revenues of non-struck carrier parties that were attributable to the strike, less any added direct expenses. The Board found that although the Agreement would increase management's abilities to withstand the economic impact of a strike, there was no basis for any inference that the agreement would constitute an impediment to *bona fide* collective bargaining, or would interfere with the prompt settlement of disputes.

In 1962 the trunkline carriers (now eight), amended their agreement to provide for a guaranteed minimum payment to a struck carrier in the form of "supplemental" payments which, together with the windfall payments, would provide the struck carrier with a recovery equivalent to 25% of its normal operating expenses. The maximum contribution to "supplemental" payments by any participating carrier was limited to ½ of 1% of the carrier's operating revenues for the prior calendar year. In addition, the coverage of the Agreement was extended to strikes called in the absence of appointment of a Presidential Emergency Board, or where the Report of the Emergency Board failed to make recommendations on the merits of the dispute, provided the struck carrier had in all respects acted in compliance with the Railway Labor Act. In approving the amended Agreement in 1964,[2] following an evidentiary hearing, the Board found that the Agreement offered, at a not unreasonable cost for the protection obtained, a substantial measure of relief against the costs of strikes, and thereby contributed to industry stability in an industry particularly vulnerable to, and plagued by, strikes.

[2] Mutual Aid Pact Investigation, 40 CAB 559 (1964).

Opinion

The present proceedings initially sought approval of the renewal of the 1962 Agreement, as approved by the Board in 1964. However, in October 1969, following hearing and the Administrative Law Judge's approval of the renewal, the trunkline carriers amended their agreement in two major respects, as follows:

> 1. The level of "supplemental" payments to a struck carrier was increased from 25% to a 35-50% sliding scale (50% for the first two weeks, then decreasing 5% weekly to 35% in the fifth week) of the struck carrier's "normal air transport operating expenses."
> 2. The maximum annual obligation of a participating carrier to contribute to supplemental payments to a struck carrier was increased from ½ to 1% of the paying carrier's air transport operating revenues in the preceding calendar year.[3]

By Order 70-7-114, July 23, 1970, the Board, without further evidentiary proceedings, approved the Mutual Aid Agreement as it had been amended by the October 1969 amendments. The Board agreed with the Administrative Law Judge that the Agreement was fully consistent with national labor policy; that the developments since the prior proceeding further supported the contribution of the Agree-

[3] Other amendments, which are not disputed by the parties, provide for modified entry requirements which permitted new parties, or trunkline carriers previously parties to the Agreement, to become parties by November 13, 1969, without any requirements for back payments or a waiting period (as a consequence of this amendment, Continental and National rejoined the Agreement effective November 15, 1969, and Western became a party as of October 3, 1970); stricter withdrawal procedures requiring that the parties give a one year's written notice of intent to withdraw from the Agreement; and revision of the arbitration procedures to cover disputes involving amounts due or owing under the Agreement.

ment to airline stability; that the evidence established that the Agreement had had little, if any, impact upon labor management relations; and that the evidence did not show that the Pact had had any material effect upon the collective bargaining process. Specifically with respect to the October, 1969 amendments, the Board concluded that, "while the recent amendments strengthen the Agreement, they do not change its basic nature or add any new element which suggests that it, unlike its predecessor, is adverse to the public interest." The Board noted that it was unable to conclude that the agreement, as amended, would induce strikes or exacerbate labor-management relations, or create an imbalance in the collective bargaining process so as to pose a threat to the attainment of the public interest objectives of the Act. The amended Agreement, the Board found, was consistent with national labor policy and violates neither the Federal Aviation Act nor the Railway Labor Act. The favorable aspects of the Agreement in making a specific contribution to airline stability under conditions of increased cost pressures and declining earnings and profit margins, and in providing at a not unreasonable cost a substantial measure of relief against the costs of strikes, would override any detriments that might arise from the greater recoupment by the airlines of strike losses. The Board recognized that the amendments would provide substantially greater recoupment of strike losses, particularly in the case of short strikes when maximum benefits were provided. However, in this connection the Board stated:

> "It hardly seems reasonable to believe that a carrier will risk a strike on speculation that the strike will be short and that the carrier will realize the maximum benefits. Carriers must, under the new Agreement, as under the old, face the prospect that in all

> probability mutual aid will not meet their strike losses. Finally, the possibility of permanent diversion of traffic to competing carriers will serve as a positive incentive for carriers to avoid strikes."

On reconsideration, the Board, by Order 70-11-110, November 23, 1970, vacated its prior Order to the extent it approved the amended Agreement, and remanded the proceeding for the taking of further evidence with respect to the amended Agreement on events which had occurred since the close of the earlier hearing. These events included not only the amendments, but also the impact of two subsequent labor disputes. In reaching this determination, the Board stated:

> "We are not presently persuaded that our earlier determination was in error. However, in fairness to the parties and to ourselves, we believe that we should reserve making a final judgment in this important matter until we have before us a fully developed record on the current facts, with all parties afforded an opportunity to present their evidence and arguments and to be fairly judged on that evidence and those arguments."

Following the Board's remand, the carriers, on December 10, 1970 adopted an additional amendment, effective January 1, 1971, to permit entry and participation in the Agreement by local service carriers.[4]

[4] In Order 70-7-114, the Board rejected the requests of Mohawk and North Central to withhold approval of the Mutual Aid Agreement until provision was made for participation of the local service carriers. The Board noted, nevertheless, that such participation was a matter which might well be considered by the two segments of the industry, and its decision denying this request was without prejudice to any future agreement of such a nature which might be filed.

Opinion

In his Initial Decision in the remanded proceeding, Administrative Law Judge Arthur S. Present concluded that the principal 1969 amendments to the Mutual Aid Agreement, providing for an increase in the supplemental payments from 25% to 35-50%, and an increase in the maximum of supplemental payment contributions from ½% to 1% of the participating carriers' air transport operating revenues in the preceding calendar year, should be disapproved. In addition, he concluded that the December 1970 amendment providing for participation of the local service carriers should likewise be disapproved. The disapprovals were, nevertheless, to run prospectively only. On the other hand, Judge Present found that the Agreement, in the absence of applicability of the disapproved amendments, would not be adverse to the public interest or in violation of the Federal Aviation Act, and should be approved for an indefinite period, subject to conditions.

By Order 72-4-59, the Board exercised discretionary review. Exceptions to the Administrative Law Judge's disapproval of the amendments to the Agreement were filed by the trunkline carrier parties to the Agreement, the local service carrier parties, and the Bureau of Operating Rights. (The Bureau also proposes that approval should be limited to five years.) ALPA and Six Union Parties (jointly) (ALDA, BRAC, FEIA, IAMAW, TWU and CWA) filed exceptions to Judge Present's decision insofar as he approved the Mutual Aid Agreement. Briefs have been filed[5] and

[5] Briefs to the Board were filed by the trunkline carriers, the local service carriers, ALPA, the Six Union Parties, and the Bureau. APA and Airline Mechanics Fraternal Association adopted their joint brief to the Administrative Law Judge as their brief to the Board. Allegheny Airlines filed a statement of position stating its belief that membership in the Agreement should be open to all certificated carriers, and that its decision not to join should not be construed as opposition.

oral argument heard. Accordingly, the case is ready for decision.

Upon consideration of the record and the contentions of the parties, we find that we must confirm our original view, expressed in Order 70-7-114, that the various amendments do not so change the basic nature of the Agreement as to make the amended Agreement, unlike its predecessor, adverse to the public interest. We find no evidence of record to persuade us that our original reasons are invalid. Thus we cannot agree with the conclusion of the Administrative Law Judge that the respective amendments should be disapproved. We have also concluded that, subject to a condition which will insure that mutual aid payments will not increase subsidy, local service carriers should be permitted to participate in the Agreement. Accordingly, we find that the Agreement as amended by the amendments of October, 1969 and December, 1970 should be approved, subject to conditions. We will, nevertheless, limit our approval to a period of five years.

Judge Present found that the Mutual Aid Agreement, in the absence of the increases in the supplemental payments effectuated by the 1969 amendments, and without participation by the local service carriers, would not be adverse to the public interest or in violation of the Act, and should be approved. He further found that the record "does not establish that any carrier has incurred or prolonged a strike because of the increased level of mutual aid. Nor does it demonstrate that the viability of any carrier has been critically threatened because of the higher level of contributions required under the amended Agreement." [6] Thus, Judge Present found no direct showing on the reopened record that the amended Agreement, limited as indicated,

[6] I.D. 25, 31-32, 41.

has operated in a manner inconsistent with the public interest, and we agree. We therefore adopt as our own the findings and conclusions of Judge Present in his Initial Decision, attached hereto as an Appendix, except as modified by, or inconsistent with, the views expressed herein.

I.

The Administrative Law Judge found that there were many significant pressures upon a carrier to settle a strike and hence there was no likelihood that a carrier receiving mutual aid payments would prolong a strike indefinitely. However, he saw a potential danger that the 1969 amendments which increased the supplemental payments might encourage a carrier party to the Agreement, particularly a weak airline, to prolong a strike for the short-term benefits of the increased payments. Thus, the increases, in his view, would be adverse to the public interest.

Although, as Judge Present noted, the record fails to demonstrate that the increased payments have in fact had any significant effect on labor-management negotiations, it must be recognized that the increases in supplemental payments were specifically intended to enhance airline management's ability to resist the economic pressures of a strike. It would be naive to assume that management, in its negotiations with labor, would totally ignore the financial cushion that the increased level of mutual aid payments provide.

However, in our view, the appropriate question is not whether a strike might be terminated in some cases more rapidly if increased mutual aid payments were not available. Rather, it is whether the mutual aid payments so shift the bargaining balance in favor of carriers as to create a serious likelihood that a carrier might resist settlement of

a strike on a reasonable basis in circumstances where such a settlement was possible. We are unable to conclude that the Mutual Aid Agreement, either in its original form, or as amended to provide for the increased level of supplemental payments, has altered the negotiating balance between airline management and airline employees in any manner which would be inconsistent with the public interest. Nor can we conclude that the mutual aid payments, of themselves, could become a significant factor in prolonging a strike that otherwise was capable of settlement on a reasonable basis.

The evidence is persuasive that the amended Mutual Aid Agreement has not resulted in any unwarranted shift in the negotiating balance in favor of airline management. In the first place, the expert testimony of record demonstrates,[7] and we agree, that the nature of the air transport product is such that the position of management in labor negotiations in the air carrier industry is somewhat weaker than managements in other types of industries, by reason of the greater impact of a strike on air carriers. The air transport industry, as a service industry, differs from industries such as manufacturing in that the commodity it sells is perishable. Air transport service cannot be stored, like manufactured goods, in contemplation of a strike. Once the plane door closes on empty available seats, that commodity is lost. The air transportation industry, even more than other transportation industries, is subject to this phenomenon because of its heavy dependence upon passenger transport, which is almost totally incapable of stockpiling.

In addition, the evidence with respect to wage settlements in the airline industry demonstrates that the employees retain substantial and effective bargaining power regardless

[7] TCE 80, pp. 11-12.

of the Mutual Aid Agreement. Thus, the record shows that air carrier wages, both average for all employees, and average for ground (rank and file) employees, are higher than, and increases have increased faster than, wages in other industries, including other transportation industries.[8] For the period 1967-1970, airline employment costs increased by some 33%, while the consumer price index increased only some 17%.[9] Furthermore, although in the 1960's increased airline employment costs were more than offset by increases in airline employee productivity, commencing in 1968, wage increases have outstripped increases in employee productivity by a substantial margin. For example, in 1970 employment costs increased some 13.3%, while employee productivity increased only some 2.3%.[10]

Indeed, this 13.3% increase in employment costs in 1970 (during which the increased level of mutual aid payments was first in effect) surpassed the 8.3%, 6.8%, and 9.1% increases in the prior three years 1967, 1968, and 1969, respectively. These facts do not show that the increased level of payments deprived employees of effective bargaining power.

We recognize that the increased payments are specifically designed to, and indeed may well increase a carrier's willingness or ability to resist union demands which the carrier considers to be unreasonable. However, it does not follow that the Agreement thereby becomes adverse to the public interest. The pressures upon a carrier to settle a strike, despite the increased mutual aid payments, are so great that we perceive little danger that a carrier could be significantly influenced, by reason of such payments alone,

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[8] TCE 41, 41a, 42.

[9] TCE 41a, 44, 45.

[10] TCE 46, 47 (p. 4).

to resist what it considered to be a reasonable settlement, or to try to force unreasonable concessions on the part of labor.

The pressures for settlement of a strike arise most significantly, of course, from the major loss of revenues which might be anticipated but for the strike. These include not only the actual out-of-pocket losses occasioned within the strike period, but also the loss of profits which would have accrued had there been no strike. Moreover, in addition to the immediate financial repercussions, a strike produces a serious impact on the carrier's operations even after the strike has been settled. In addition to costs, such as crew training, associated with the resumption of operations, there is the immediate loss of post-strike revenue attribuable to the absence of advance bookings. Further, and of substantial significance, there is the long-term loss of traffic attributable to the loss of the carrier's identity in the market, part of which may be permanent by reason of changed travel patterns of the airline's customers. The detrimental impact of these post-strike factors necessarily become more severe the longer a strike continues.

There is, of course, the possibility that a relatively weak carrier might settle a strike upon terms it did not consider would be reasonable, in order to avoid permanent financial deterioration as a consequence of strike losses. In such circumstances, the absence of mutual aid payments, or the absence of the increases in the mutual aid payments, might result in the settlement of a strike (on the union's terms) earlier than would be the case had the carrier been better able to withstand the financial repercussions of a strike. Indeed, under such circumstances a carrier might be forced to accept demands which, in the long run, would have even more serious economic consequences for the carrier. The

mutual aid payments, in this respect, serve the purpose of protecting the carrier from being placed in the position where its precarious financial situation—rather than the merits of the negotiating positions—becomes the predominant factor in determining when a strike should be settled. The Board is unable to conclude that this purpose is contrary to the public interest.

In support of his conclusion that the increased payments posed tempting short-term benefits, Judge Present cited particularly certain "operating profits" experienced by National, Northwest, and Mohawk during their strike periods, which were attributable to the new higher level of the amended mutual aid payments, as well as TWA's decreases in losses. Thus the record shows[11] that National, for the strike period from January 31 to May 26, 1970, experienced a net profit of $810,000, following receipts of some $28 million in mutual aid. Northwest, for the strike period from July 9 to December 4, 1970, reported a net profit of $17.9 million, following receipts of $47.3 million in mutual aid payments. Mohawk similarly reported a profit of $29,000 in the first quarter of 1971 attributable to mutual aid payments for a part of its strike. However, if the financial results of the full strike period in which Mohawk participated in the Agreement are included (including an additional six days in April, *i.e.*, January 1 to April 6, 1971), the net is a loss of $426,000. In addition, for the two-day TWA strike (October 20-21, 1970), TWA reduced its net loss from $3.3 million, during the strike period, to

[11] Serious strikes occurred on Air West and Northwest Airlines following close of the hearings in this case. The facts regarding these strikes, and data concerning the relationship between the mutual aid payments and strike losses are therefore outside the record. However, based on these carriers' financial reports to the Board, we find that had such facts been included in the record, they would not have altered our conclusions herein.

$879,000 by reason of $2.5 million in mutual aid payments. TWA experienced extraordinary losses in 1970, and the $879,000 net loss was less than the $1.7 million loss projected for this period assuming there had been no strike.[12]

However, as previously noted, there must be considered not only the direct operating results during the actual strike period, but the loss of normal profits during such strike period, and post-strike losses, as well. The Administrative Law Judge's analysis is based on strikes which occurred primarily in 1970, an atypical year which reflected losses by many carriers. Nevertheless, even in this period, in the absence of the strike National and Northwest reasonably estimated that their profits would have been some $6 million and $29 million, respectively. Taking into account loss of estimated normal profits, strike period losses, and post-strike losses, neither of these two carriers recovered even 60% of their total losses attributable to the strike. National suffered total strike losses of $47.4 million ($6 million estimated normal profit; $27.2 million strike-period losses; and $14.2 million post-strike losses), against mutual aid receipts of $28 million. Northwest suffered total strike losses of $87.5 million ($29.3 million estimated normal profit; $29.3 million strike-period losses; and $28.9 million post-strike losses), against mutual aid receipts of $47.3 million. The losses for each of these carriers, as a result of their strikes (taking into account the anticipated profits which they otherwise would have achieved, as well as post-strike losses) amounted to some $19.4 million and $40.2 million, respectively, even after receipt of the increased mutual aid payments. Thus National recovered only some 59.1% of its total strike losses in mutual aid payments, while Northwest's mutual aid payment recovery represented only some

[12] Source: TCE-53, MO-6.

54% of its total strike losses. Similarly, the $2.5 million mutual aid payments represented only 33.4% of TWA's total strike-cause losses ($7.3 million, including $5.7 million post-strike losses).[13] Hence, in our judgment, the so-called short-term "benefits" of mutual aid fall far short of real profits. Losses from strikes despite mutual aid payments remain substantial and continue to exert tremendous economic pressure on the carrier's side of the bargaining table.

The union parties argue that there is a cause and effect relationship between the increased supplemental payments and the length of the National, Northwest and Mohawk strikes, during which carrier managements received the amended higher level of supplemental payments. However, the record reveals no such relationship. In the National strike the carrier accepted the National Mediation Board proffer of arbitration prior to commencement of the strike, but such proffer of arbitration was rejected by the union (TCE-22, pp. 1-2, Attachments 1, 2). In the Northwest

[13] TCE-53. The initial decision (p. 17) and ALPA's brief (p. 22) make reference to an alleged 29.2% level of normal operating expenses during the course of a strike shutdown. This figure is apparently taken from Jt. Exh. 191, p. 2, in the original renewal proceeding, wherein Northwest projected expenses for a complete shutdown based on its expense reduction in a partial shutdown of ⅓ of its operations (Jt. Exh. 153). The projection was stated to be based on certain assumptions, and excluded the higher proportional expenses in the first weeks of a strike. A more accurate picture would appear to be based on the carriers' exhibits reflecting actual expenses incurred during six strikes where there were total strike shutdowns (Jt. Exhs. 152, 154). The level of expenses during these six strikes ranged from 23% to 56% of normal operating expenses, with an average for the total of the six of approximately 36%. These exhibits also reflect the higher level of expenses for strikes of shorter duration. While the declining 50% to 35% scale of guaranteed mutual aid payments would appear to be slightly in excess of the level of operating expenses during a total shutdown reflected by these 1958-1961 figures, the excess would appear to be substantially less than the inevitable post-strike losses, and hence does not appear to be unreasonable.

strike the union rejected arbitration while the company had the arbitration proffer under consideration (TCE-23, p. 3, Attachment 4). In the Mohawk strike the carrier accepted arbitration as to most of the issues. The union initially rejected the proposed arbitration, although it later consented to arbitration provided that all issues were submitted. Prior to the strike, the Mediator noted that the union's unwillingness to concentrate on reaching accord on the principal economic matters before trying to conclude agreement as to unresolved working conditions constituted an impediment in the mediation proceedings (Exh. MO-201, p. 2, 37; MO-C, p. 3).

The unions also vigorously argue that the Agreement creates an incentive for a member carrier to refuse to bargain in good faith as required pursuant to the Railway Labor Act, relying instead on the Mutual Aid Agreement payments to support it during the course of the strike. We find no merit in this argument.[14] We have already discussed the serious impact of a strike upon a carrier, despite the Mutual Aid payments. Moreover, there is no evidence in the record which would support the unions' contention. Rather, the record is replete with evidence of the earnest and consistent good faith efforts of National, Northwest and

[14] Nor can we find any merit to the contention that the Agreement is adverse to the public interest by reason of any tendency to establish industry-wide bargaining. The terms of the agreement are unrelated to the nature of the bargaining unit, and despite effectiveness of the Agreement since 1958, there has been no transition to industry-wide bargaining. Similar contentions have previously been rejected. Six Carrier Mutual Aid Pact, 29 CAB 168, 172 (1959); Mutual Aid Pact Investigation, 40 CAB 559, 604-606, 631 (1964). *Cf.*, Kennedy v. Long Island Railroad Company, 211 F. Supp. 478, 488 (1962).

We further disagree that this proceeding must be considered in conjunction with the issues in the Airline Industrial Relations Conference Investigation, Docket 23267. That proceeding presents independent issues and must be determined on its own merits.

Mohawk, as well as other mutual aid members affected by strikes, to find a resolution to their strikes throughout the course of difficult labor negotiations.[15] Indeed, in the period between 1968 and 1971, the number of strikes among Agreement members has been relatively minimal, compared to successful negotiations of labor settlements. During this period some 92 out of a total of 102 collective bargaining agreements entered into by carrier parties have been negotiated without a strike.[16]

Also of significance is a provision of the Mutual Aid Agreement itself which provides an additional incentive toward good faith bargaining. Payments are provided for under the agreement to the struck carriers only where the union has failed to follow the recommendations of a Presidential Emergency Board; or where the struck party *has in all respects acted in compliance with the Railway Labor Act* and a Presidential Emergency Board does not offer a solution. Should the carrier fail to bargain in good faith in negotiations for settlement of a strike, and hence be in violation of the Railway Labor Act, the carrier would not be entitled to Mutual Aid payments.

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[15] See, *e.g.*, Exhs. TCE-13, 22, 23; MO-C. Although the unions assert that the Northwest strike was prolonged by an alleged Railway Labor Act violation, against which a preliminary injunction was issued by a Federal District Court in Minnesota, the record fails to support their contention. The Mediator's Report attributes the continuation of the Northwest strike, after settlement of the economic issues, to matters unrelated to the alleged Northwest violation of the Railway Labor Act. In any event, the record does not reveal any reasonable connection between the Mutual Aid payments, and the alleged Railway Labor Act violation, even if it were assumed that such a violation did prolong the strike. Finally, even assuming such a connection, isolated instances of the nature of this alleged Railway Labor Act violation, which does not involve a refusal to bargain in good faith, would not, in light of the other considerations set forth herein, alter our conclusion that the agreement is consistent with the public interest, and should be approved subject only to the conditions imposed herein.

[16] TCE-11 (Rev.).

In sum, we think that the Mutual Aid Agreement, as amended, does not relieve carrier management of significant economic pressure to settle a strike, even though it may enable a carrier to survive a strike without permanent financial instability. In other words, the Agreement does not upset the collective bargaining process, which depends on the stimulation of economic pressure on both sides of the bargaining table. We simply cannot conclude, on the basis of this record, that there is any likelihood that the mutual aid payments would contribute to the unnecessary prolongation of strikes or otherwise upset a fair economic balance between labor and management in any manner which would be contrary to the public interest. Rather, as the Board has previously found, we find again that the Mutual Aid Agreement represents a legitimate resort by the carriers to economic self-help, in a manner that is in no way inconsistent with the national labor policy.[17]

Nevertheless, the experience under the 1969 amendments to the Mutual Aid Agreement has been very limited, and, as noted, the period represents an atypical one in terms of airline prosperity. Accordingly, we believe it appropriate to limit our approval to a period of five years in order to provide an opportunity to reexamine the amended agreement in light of a broader base of experience under the new provisions.

We also disagree with the conclusion of the Administrative Law Judge that the amendments to the Agreement would be detrimental by reason of the adverse impact which the increased payments may have upon the non-struck carriers who must pay them under the Agreement, and that

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[17] Mutual Aid Pact Investigation, 40 CAB 559, 561, 607-609 (1964). See also, N.L.R.B. v. Insurance Agents' International Union, 361 U.S. 477 (1960); Kennedy v. Long Island Railroad, 319 F. 2d 386 (1963), *cert. denied* 375 U.S. 830 (1963).

the amended Agreement is defective in that it does not attempt to differentiate among such carriers on the basis of their financial health. The plan, in effect, constitutes a form of strike insurance. Strike insurance not markedly dissimilar from that here involved has previously been considered by the courts as being consistent with the national labor policy.[18] In effect, the carrier parties to the Agreement are paying premiums based on collective loss experience, to provide protection against the possibility of far greater, and perhaps financially crippling, losses that would inevitably be suffered as a result of a strike.

The plan does not, of course, attempt to provide any assurance that the receipts, in the event of a strike, would be equivalent to the payments made under the plan in any given carrier case. As the trunkline carriers point out, nevertheless, since 1960 every present trunkline member of the Mutual Aid Agreement has suffered at least one strike, and 6 of the 9 members have been struck since 1969.[19] And as we have shown, the potential strike losses are indeed formidable.

Each individual carrier's mutual aid payments are modest in comparison. Thus, for the period January 1, 1970 to June 30, 1971 (the period in which the higher level of supplemental payments was in effect) the trunkline carriers' contributions to supplemental payments represented a range from .44% (for Eastern and Continental) to .50% (for Braniff and United) of their operating revenues for the same period. American's, Pan American's and TWA's percentages were .46%, .48% and .46%, respectively. The percentages for the local service carriers, with the excep-

[18] See, Kennedy v. Long Island, Railroad, 319 F.2d 386 (1963), *cert. denied* 375 U.S. 830 (1963), affirming 211 F. Supp. 418 (1962).

[19] TCE-4.

tion of North Central (.03%), were each .04%.[20] (See Attachment 1.)

This level of payments may be contrasted with the ratio of National's, Northwest's and Mohawk's strike losses to each carrier's operating revenues for the year preceding the strike. These losses represented for National 17.7%,[21] for Northwest 18.8%,[22] and for Mohawk 16.8%,[23] of the carriers' prior year's operating revenues.

In addition, a substantial safeguard is provided in that no carrier can be required to make contributions to the plan, in the form of supplemental payments, in an amount exceeding one percent of its operating revenues for the previous calendar year.[24] While the one-percent limitation may not be perfection in insuring against detrimental impact upon member carriers, it does offer significant protection reasonably related to the ability of carriers to pay. Similarly, the proportional share of a carrier's contribution to supplemental payments made to a struck carrier is based on the paying carrier's previous year's revenues. Thus,

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[20] Not included are National, Northwest and Mohawk whose revenues were significantly affected by lengthy strikes during the period, and Western which did not become an agreement participant until October 3, 1970.

[21] 1969 operating revenues, $268 million. Strike losses, $47.4 million (see p. 13, *supra*).

[22] 1969 operating revenues, $465 million. Strike losses, $87.5 million (see p. 13, *supra*).

[23] 1969 operating revenues, $66.2 million. Strike losses for the total period of the strike (Nov. 1970 to Apr. 1971), $11.1 million (including only actual losses during the strike period) (Exh. MO-6). Mohawk became a Mutual Aid participant on January 1, 1971.

[24] There is, of course, a high probability that this 1% contribution would not be required in many years, particularly in light of the increased representation of the air carrier industry reflected by the present air carrier participation. For example, for the 1970-June 1971 period (Attachment 1), in which several serious strikes occurred, the 1% limit was not reached.

the contribution is reasonably related to the losses that might be anticipated in the event of a strike, and these payment criteria provide additional protection against unduly burdensome payments.

While, as Judge Present points out, it is possible for the one-percent limitation to be exceeded by reason of the windfall payments,[25] it does not follow that any increased detriment would be incurred. Windfall payments by definition represent added profits attributable solely to the strike.[26]

We are therefore of the view that the plan does provide substantial protection from financially crippling strike losses, at a cost which is reasonable. It may be that the higher payments will impose a certain financial burden on carriers which may be financially weak. For the reasons indicated, we think this burden, unlike potential strike losses, will not be a crippling one. In any event, such carriers are precisely those which are most vulnerable to strike threats and which could, in the absence of mutual aid payments, face a choice between acceeding to demands creating expenses far exceeding strike losses or incurring

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[25] The one-percent limitation applies only to supplemental payments, not to windfall payments.

[26] The Administrative Law Judge, utilizing an analysis based on the rate of return on investment of the respective carriers, urges that the payments are inequitably distributed among the paying carriers. We find this analysis unpersuasive. For example, although United had a lower rate of return on investment than other carriers, its revenues are significantly higher than carriers with a higher rate of return on investment, and hence it is capable of making substantially higher mutual aid payments. Thus, although United's payments of some $21.9 million in mutual aid payments (more than one-half of which were windfall payments) for the period January 1, 1970 to June 30, 1971 (the period in which the higher level of payments was in effect) represented the highest payments of the carrier parties to the Agreement (I.D., App. E), the payments represented only .99% of its $2.2 billion dollar operating revenues for this period. The highest payment in terms of percentage of revenues (Eastern's 1.34%) included some 61% in windfall payments (see Attachment 1).

strike losses resulting in ruinous financial instability. Hence, such carriers may reasonably think they need the protection afforded by mutual aid "insurance." The choice of whether to pay what it costs to have such insurance is of course for the individual carrier to make, but if the carrier chooses to do so, we are not disposed, on this record, to foreclose that choice.

III.

We further find that participation in the agreement by the local service carriers would not be adverse to the public interest, provided it is made subject to an appropriate subsidy condition. Accordingly, the Agreement should, in this respect also, be approved. The same considerations which have led us to conclude that the Mutual Aid Agreement provides, at a reasonable cost, substantial protection from crippling strike losses, and therefore is consistent with the public interest, similarly apply to the local service carriers. Indeed, in many respects, the local service carriers, which as a group have less financial stability than the trunkline carriers, require such protection to a greater extent. Local service carriers simply do not have the financial depth which will permit them to absorb what may be huge strike losses.

The Administrative Law Judge considered that local service carriers should not be permitted to participate in the agreement. He reasoned that such participation would be inconsistent with the scheme for subsidy payments pursuant to section 406 of the Act, would represent an unwarranted financial gamble by the local service carriers and the Board, and would represent an unjustified financial drain on the trunkline carriers. We are not persuaded by these arguments.

We believe that with an appropriate subsidy condition there will exist no inconsistency between the local service carriers' participation and the section 406 subsidy provisions. The condition would provide that no payment or obligation incurred pursuant to the Agreement may be claimed as an expense for purposes of computing subsidy need under section 406 of the Act. We recognize that without such a condition, subsidy might indirectly provide strike support for carriers that have no subsidy need or entitlement under the standards of section 406 of the Act. While the Mutual Aid represents in our view a legitimate "self-help" form of strike insurance, we believe that it is not in the interest of the public to underwrite this form of strike insurance by Federal subsidy.[27]

We reject, as placing form over substance, the contention that the Mutual Aid payments would inevitably be funded by Federal subsidy because there is no practical means for segregating the subsidy funds from the carriers' general funds from which Mutual Aid payments might be drawn. Subsidy payments normally make up a very small portion of a carrier's overall revenues. So long as Mutual Aid payment expenses are excluded from the subsidy computations, there is no basis for concluding that the Mutual Aid payments would, in any realistic way, be funded by subsidy payments.

It is urged to us that subsidy ought not be paid unless actual operations are conducted, and hence should not be payable during strikes. From this premise it is argued that Mutual Aid payments are inconsistent with the Act because by definition they are paid during a strike when the

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[27] *Cf.*, Mutual Aid Agreement Between American Airlines, Inc. and Mohawk Airlines, Inc., Order E-24213, September 23, 1966; Pan American Mail-Rate Case, 35 CAB 540, 555 (1962).

carrier is not operating. Even assuming the correctness of the premise, we reject this argument. So long as a local service carrier's participation in the Mutual Aid Agreement does not increase the level of Federal subsidy paid to the carrier, we can perceive no inconsistency between the Agreement and the subsidy scheme of the Act arising simply because Mutual Aid payments might be received in periods when subsidy was not payable. We find nothing in the Act forbidding a carrier to receive private funds from legitimate sources during a strike. Similarly, the argument that participation represents an unwarranted gamble for both the local service carrier and the Board, fails to convince us. There is, of course, no assurance that receipts will exceed payments. However, as noted, membership is in effect a type of insurance which, for a reasonable and limited cost, provides the local service carriers with significant protection against the financially crippling and far greater losses that might be suffered as a result of a strike. Thus, for example, Piedmont has a maximum annual participation of from $500,000 to $600,000 based on its revenues. In contrast to this limited maximum annual participation, it would have received payments as a result of its 28-day 1969 strike amounting to $1.8 million to offset a strike loss of some $2.2 million, had it been a Mutual Aid participant at that time.[29] The one-percent limitation provides reasonable assurance that no local service carrier will be seriously adversely affected by payments under the Agreement.

It is also argued that trunklines may make Mutual Aid payments which are proportionally higher than local ser-

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[28] But see, American Overseas Airlines, Inc. v. C.A.B., 254 F. 2d 744 (1958).

[29] Exh. PI-6.

vice carriers would have to make and that this higher proportion is a financial drain adverse to the public interest. We are not persuaded. First, as we have noted, the Agreement provides reasonable assurance that the financial drain to the extent it may exist, will be borne by those carriers which, on the basis of total revenues, are in the best position to incur it. Second, we do not find that the potential receipts which a carrier may derive from the Agreement in the event of a strike are unreasonably disproportionate to the potential payments which that carrier may have to make to another carrier in the event of a strike on the second carrier. Moreover, it does not appear unreasonable to us for the trunkline carriers to seek, and pay a price for some protection against the possibility that a local service carrier, solely by reason of its relatively weak condition, might succumb to employee demands which otherwise would be unacceptable and which could then be demanded of the trunkline carriers as a new industry norm.

It is unfortunate, of course, that all the participants in the Agreement will suffer economic loss by reason of a strike on one carrier participant. However, in our view, the Agreement equitably and reasonably distributes that loss among all the participants.

IV.

Looking at the Mutual Aid Agreement as a whole, we are mindful of the views of some that there would be fewer and shorter strikes if there were no Mutual Aid Agreement because there would be greater economic pressure on a carrier to settle. We are also mindful of the very real hardships which work stoppages in the airline industry inflict on the public. Serious personal inconvenience or

worse to travelers, economic loss to shippers and consumers, lower revenues to airport operators, foreclosure of numerous business opportunities and reduced economic life to the community as a whole—all are the immediate results of airline strikes, particularly over routes which only the struck carrier is authorized and willing to serve.

Obviously, a strike is far from the ideal way of resolving labor disputes. Fortunately, as the record reveals, the great majority of labor disputes are resolved by negotiation between the parties without recourse to a strike. Nevertheless, under the national labor policy, a strike remains available as an ultimate resource in reaching an accommodation between employee demands and terms acceptable to managements.

Whether the disruption caused by work stoppages in the air transportation field is sufficient to warrant revision of the national labor law so as to prevent or control them is a question of policy for the Congress. However, we do not believe the appropriate remedy is to compel carriers—whether by law or by undue economic pressure—to accept all requests of employees, just as we would not agree that employees should be forced to accept all proposals of carrier managements.

Collective bargaining in good faith remains the cornerstone of national labor policy. Collective bargaining is encouraged when there is substantial economic pressure on both sides of the bargaining table. As we have observed, the perishable nature of air transportation makes individual carriers peculiarly vulnerable to strike threats. The Mutual Aid Agreement is an effort on the part of the carriers collectively to strengthen the bargaining position of the individual carrier. We conclude that it is not contrary to the public interest for the carriers to do so, in the form and

to the extent provided in the Agreement now before us. As we have found, the Agreement does not so alter the bargaining balance as to lift from the carriers heavy economic incentives to settle work disputes and hence does not remove the pressures essential for collective bargaining in good faith. At the same time, the Agreement does afford the carriers a greater measure of influence over labor costs than they would have without the Agreement. Since labor accounts for nearly half of all airlines costs and since increases in labor costs ultimately are reflected in higher fares and rates to the traveling and shipping public, additional restraints consistent with collective bargaining are, in our opinion, not contrary to the public interest.

We have given due consideration to all of the contentions of the parties and find, except to the extent indicated, that they do not alter our decision.

Accordingly, in view of the foregoing and all the facts of record, it is found:

1. That the Airlines Mutual Aid Agreement, including the Airlines Mutual Aid Agreement as amended by the amendments of October 1969 and December 1970, is not adverse to the public interest or in violation of the Act and should be approved for a period of five years, subject to the following conditions:

(a) The approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act;[30]

[30] We find no justification for departure from those conditions which have been attached to our approval of the Mutual Aid Agreement since 1959, so as to include the condition proposed by ALPA that would provide that Mutual Aid payments should be excluded from allowable expenses for determining rates under the Federal Aviation Act. The question of the allowance of such expenses in connection with rate proceedings is more appropriately reserved for consideration in connection with such rate proceedings as may come

(b) The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

(c) Approval of participation in the Agreement by each carrier party thereto is subject to the condition that no payment or obligation incurred pursuant to the Agreement shall be claimed as an expense for purposes of computing the need of such carrier for compensation payable by the Board under section 406 of the Federal Aviation Act; nor shall any carrier be entitled to receive any compensation payable by the Board for payments made or obligations incurred by that carrier pursuant to the Agreement;

(d) In accounting for the amounts due to others and the amounts due from others under the Agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by Part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the Agreement as may be reasonably required by the Director of the Board's Bureau of Operating Rights; and

(e) Copies of all arbitrators' decisions and awards issued under the Agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

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before the Board. It is sufficient to provide, as we have in the past, that our approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act.

2. That except to the extent granted herein, the application and all other requests herein, should be denied or dismissed.[31]

An appropriate order will be entered.

BROWNE, Chairman, GILLILLAND, Vice Chairman, and TIMM, Member, concurred in the above opinion. MINETTI and MURPHY, Members, filed the attached joint concurrence and dissent.

[31] A motion filed by the Air Line Pilots Association, requesting an order requiring Northwest Airlines to return, or to place into escrow, all Mutual Aid payments received pursuant to the amendments disapproved by Administrative Law Judge Present, and barring or escrowing such future payments, was withdrawn as part of the settlement of the Northwest strike, and accordingly, will be dismissed.

PERCENT OF MUTUAL AID PAYMENTS
TO CARRIER REVENUES
1970 — JUNE 1971

Carriers*	Revenues ($000) (1970-6/71)	Payments ($000)			Percent of Payments to Revenues		
		Wind.	Supp.	Total	Wind.	Supp.	Total
TRUNKS							
American	1,701,893	3,136	7,880	11,016	.18%	.46%	.65%
Braniff	485,139	175	2,407	2,582	.04%	.50%	.53%
Continental	439,508	1,047	1,913	2,960	.24%	.44%	.67%
Eastern	1,498,282	13,440	6,571	20,011	.90%	.44%	1.34%
Pan American	1,661,428	2,286	7,937	10,223	.14%	.48%	.62%
TWA	1,716,770	1,310	7,962	9,272	.08%	.46%	.54%
United	2,213,133	10,967	10,961	21,928	.50%	.50%	.99%
LOCAL SERVICE							
Frontier	138,384	—	59	59	—	.04%	.04%
Hughes Air West	113,635	—	50	50	—	.04%	.04%
North Central	139,554	—	43	43	—	.03%	.03%
Ozark	107,851	—	42	42	—	.04%	.04%
Piedmont	108,925	—	41	31	—	.04%	.04%

* Not included are National, Northwest and Mohawk whose revenues are substantially affected by lengthy strikes during the period, and Western which did not become a Mutual Aid party until October 3, 1970.
Source: CAB Air Carrier Financial Statistics; I.D. App. E

Opinion

MINETTI and MURPHY, Members, Concurring and Dissenting:

We cannot join the majority in giving unqualified approval to the Mutual Aid Agreement in its currently amended form. At the same time, we do not urge total disapproval of the Agreement. Rather, we would allow the Agreement to stand in the form in which it existed prior to the major amendments of October 1969, which increased both the level of "supplemental" payments to a struck carrier and the maximum annual obligation of a participating carrier to make such payments.[1] We also would approve, subject to the subsidy condition imposed by the majority, the December 1970 amendment which permits participation in the Agreement by local service carriers. However, we would disapprove as adverse to the public interest the October 1969 amendments relating to increased "supplemental" payments. Finally, we would remand for further hearing the issue of whether an additional condition should be imposed precluding payment of benefits under the Agreement to a struck carrier which has violated the Railway Labor Act subsequent to the commencement of a strike.

In letting stand the Mutual Aid Agreement as it existed prior to October 1969, we do not consider it necessary to find, and do not find, that the Agreement has been or will be affirmatively beneficial to the public interest, either by contributing to the "stability" of airline industrial relations or by assisting carrier managements in resisting union wage demands. In this connection, we regret that the Board's majority opinion here goes as far as it does in seeming to identify the public interest with strengthening the bargaining position of carrier management in airline

[1] The lesser amendments of October 1969 give us no concern and, like the majority, we would approve them.

labor disputes, which is the evident purpose of the Mutual Aid Agreement. Such an air of partnership between management and labor by a regulatory agency is antithetical to the national labor policy, and should be strictly avoided.

The Board's dilemma, of course, is a real one: under most circumstances, in view of its promotional role toward the air transportation industry and its regulatory responsibilities toward the traveling public, the Board is bound to regard whatever lowers airline costs as good, and whatever increases those costs as bad. Nevertheless, the Board cannot take that attitude toward airline wages without becoming a partisan on the side of management against labor. We do not suggest that the Board majority has here in any way deliberately set out to align itself with one side or the other of airline labor disputes. Nonetheless, it is difficult to read the majority opinion as a whole, with its recurrent emphasis on the "stability" assertedly afforded by the Mutual Aid Agreement and one the "reasonableness" of management positions (with no explicit recognition that union positions may be equally reasonable from the standpoint of the workers' interests), without deriving a distinct impression that the majority believes that strengthening management's bargaining power in wage disputes is an affirmatively beneficial thing.

However difficult it is for the Board to preserve a stance of total neutrality in labor-management conflicts, once the parties have fulfilled their statutory obligations under the Railway Labor Act, we believe the Board must bend every effort to do so. To that end, we would rigorously avoid making any judgments as to the reasonableness of either management or union positions and actions, either in gen-

eral or in relation to particular disputes.[2] We would recognize that "reasonableness" in labor disputes is a term with no fixed or generally agreed meaning, and one which inevitably takes on quite different connotations on opposite sides of the bargaining table.

Accordingly, we would abandon all attempts to find affirmative public benefits in the Mutual Aid Agreement, and instead would let it stand (in its pre-October 1969 form) as being simply neutral *vis-a-vis* the public interest. It is by now firmly established that agreements of this sort among employers in the same industry are a legitimate and permissible form of mutual economic self-help, just as are mutual assistance agreements between labor unions.[3] Given the national policy of strict governmental neutrality in labor disputes, we think the proper basis for letting the Agreement stand is simply that carrier managements should not be precluded from engaging in any lawful measure of self-help unless it is affirmatively shown to be detrimental to the public interest. In our view, based on the evidence of record in this proceeding, the Mutual Aid Agreement as it existed prior to the October 1969 amendments meets this negative test.[4]

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[2] In a few limited areas, such as subsidy, the Board may be required in some circumstances to draw conclusions as to the reasonableness of management or union conduct. See *Reopened Transatlantic Final Mail Rate Case*, 42 C.A.B. 195, 199-204 (1965), affirmed *sub. nom. Trans World Airlines* v. *C.A.B.*, 385 F.2d 648 (C.A.D.C. 1967), *cert. denied*, 390 U.S. 944 (1968). It ought, however, to avoid such judgments wherever possible, particularly in view of its frequently acknowledged lack of any special expertise in this area.

[3] See *Kennedy* v. *Long Island R.R.*, 319 F.2d 386 (1963), *cert. denied*, 375 U.S. 830 (1963); *NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. 477 (1960).

[4] When the Board in 1964 renewed its original approval of the Mutual Aid Agreement, we were both of the view that the Agreement in its then existing form would be a source of disruption and insta-

Similarly, once it is assured that mutual aid payments will not be permitted to increase carrier subsidy, we see no justification for excluding the local service carriers equally as entitled as the trunkline carriers to band together for mutual self-help in labor negotiations, and it can hardly be contended that wage standards in the two sectors of the industry are unrelated or that labor settlements in one sector do not materially influence negotiations in the order. The limitations on a participating carrier's mutual aid obligations under the Agreement, together with the local service carriers' present-day low ratio of subsidy receipts to commercial revenues, insure as a practical matter that any mutual aid payments by local service carriers will come out of commercial revenues and not out of subsidy. We agree that the majority's proposed condition is adequate to insure that subsidy will not be increased as a result of mutual aid payments. This disposes of the argument that the weight of governmental subsidy will be thrown on the management side of the bargaining scales.

However, in our judgment the increased level of "supplemental" strike payments provided by the October 1969

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bility in airline labor relations. Member Minetti took this view as to the entire Agreement, Member Murphy only as to the "supplemental payments" provisions which had been added to the original "windfall" clause of the Agreement. *Mutual Aid Pact Investigation*, 40 C.A.B. 559, 564 (1964) (dissenting opinions).

Member Murphy has now concluded on the basis of the present record that his earlier fears have not been borne out by the experience of the years 1964-69, and hence would approve the Agreement as it stood prior to the October 1969 amendments, on the basis of the negative public-interest test described in the text *supra*. Member Minetti continues to view the Agreement as provocative toward labor and as generally inimical to good labor relations in the airline industry, and accordingly he cannot give it his approval; he acknowledges, however, that the evidence of record does not affirmatively bear out his earlier fears of disruption, and therefore does not now urge that the Agreement be disapproved.

amendments to the Mutual Aid Agreement creates a different situation—one in which there is a distinct danger that labor peace will be disrupted and interruptions of airline service prolonged by the level of payments available under the amended Agreement. In this regard we agree with the conclusions of the administrative law judge who heard the testimony of the witnesses.

The 1969 amendments increased the level of "supplemental" payments to a struck carrier from 25 percent of its normal pre-strike operating expenses to a sliding scale beginning at 50 percent of normal expenses for the first two weeks of a strike and declining by 5 percent increments to a level of 35 percent of normal expenses for the fifth and subsequent weeks. Whereas the earlier 25 percent level of supplemental payments generally did not fully reimburse a struck carrier for its actual out-of-pocket running expenses during a strike, the new 35-50 percent level tends (and, indeed, was designed) to exceed a struck carrier's actual running expenses, so that in work stoppages occurring under the amended Agreement it has become typical for the struck carrier to show an operating profit during the strike period. To make possible these increased supplemental payments, the 1969 amendments also raised the annual ceiling on each participating carrier's obligation to make such payments from ½ to 1 percent of its operating revenues in the preceding calendar year.

The administrative law judge found that the increased level of supplemental payments under the 1969 amendments creates a dangerous inducement to a struck carrier in some circumstances to prolong a strike unnecessarily for the short-term benefits of the increased payments. He also found that the increased ceiling on participating carriers' supplemental payments obligations involves a threat

to the financial soundness of the paying carriers, particularly those already in financial distress for other reasons. He considered these twin dangers sufficiently serious, and their consequences sufficiently adverse to the public interest, to warrant disapproval of the two major October 1969 amendments to the Agreement.

Although the Board majority inferentially admit that the increased level of supplemental payments is bound to influence carrier managements in the direction of holding out against union demands,[5] they argue that this is not contrary to the public interest since management's bargaining power in the airline industry is unduly weak to begin with, as a result of the perishable nature of the industry's product. They also cite statistics tending to show that airline wages have increased more rapidly than those in other transportation industries; than the consumer price index (during 1967-70); than airline employee productivity (after 1968); or than airline wages themselves before the 1969 amendments.

All of these arguments we find quite irrelevant. There is no showing that air transportation is more vulnerable to strikes than other service or perishable-goods industries, and we are aware of no requirement of the national labor policy that all industries must be put on the same bargaining footing as hard-goods manufacturing industries. As for the majority's statistics, in each case they ignore other factors which would appear to account adequately for the results, without assuming any exceptional weakness of

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[5] According to the majority, it is only "unreasonable" union demands which will thus be resisted. But one man's unreasonable demand is another's reasonable request; as we have already pointed out, it is both futile and contrary to the Board's proper role as a neutral in labor conflicts to attempt to analyze the effects of the mutual aid amendments in these terms.

airline management's bargaining position in labor negotiations.[6] In our view, the issue is not whether the strengthening of airline management's bargaining position which obviously results from the 1969 mutual aid amendments is a good thing *per se*—a judgment which in our view the Board need not and should not make—nor is it whether airline employees retain effective bargaining power, which they patently do. The issue, rather, is whether under some significant sets of circumstances the 1969 amendments may give carrier management an incentive to act irresponsibly in prolonging a strike.

In our view the administrative law judge was right in his assessment of this danger. The critical point is that under the 1969 amendments a struck carrier's mutual aid benefits can be so generous that it can show an operating profit while its operations are shut down by a strike.[7]

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[6] Thus, while airline wages have increased more rapidly than those in other transportation industries, for most of the period under discussion airline revenues, profits, and productivity likewise grew much more rapidly than those of the other industries, so that generous wage increases, higher than in other industries and well in excess of increases in the cost of living, were readily supportible. Such wage trends have a momentum of their own, so it is not surprising that airline union wage demands continued high even after industry profits turned downward, especially in view of the accelerating inflation of the latter years. Productivity after 1968 fell off largely because of circumstances—the fall-off in traffic growth and the consequent glut of capacity and sharply lower load factors—over which employees had little or no control. Moreover, wage increases in excess of productivity gains are typical of a period of inflation, and are in no way unique to the airline industry. Similarly, the majority's attempt to draw conclusions from the fact that airline employment costs increased more rapidly in 1970, under the amended Agreement, than in 1967, 1968, or 1969, ignores the markedly higher rate of inflation in the later year. We agree that these statistics do not show that the 1969 mutual aid amendments deprived airline employees of effective bargaining power, but they also do not rebut the administrative law judge's concern over the danger of needlessly prolonged work stoppages.

[7] From the record it is not possible to determine whether such strike-period operating profits will occur in all cases or only in some, but clearly they are a definite possibility and do not represent simply a freak situation unlikely to recur in the future.

This seems to us a fundamentally unhealthy situation, conducive to results adverse to the public interest, much as would be in insurance scheme which resulted in the insured collecting more than the value of his loss.

To be sure, as the majority point out, the struck carrier also foregoes its "normal profits" while the strike continues. But this factor cannot always be relied on to give the struck carrier the strongest incentives to settle the strike. In several of the strikes which have occurred since the 1969 amendments took effect, the struck carrier was not in fact earning "normal profits" or indeed any profits immediately prior to the strike, and so did not forego such profits as a result thereof. This situation may well recur in future strikes[8]—particularly if, as the carriers claim, the unions concentrate their strike threats on weak carriers.[9] Even where a carrier is operating profitably on an annual basis, there are frequently "off-season" months during which it expects to lose money; if a strike occurred at such a time, the carrier would not be deterred from prolonging it unnecessarily by a loss of "normal profits".

The majority also point to post-strike losses, which are not directly compensated by mutual aid payments, as a strong inducement to prompt settlement of strikes. But, while we do not deny the reality of post-strike losses, their incidence and measurement is a matter of great complexity

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[8] We think the majority are much too quick in dismissing 1970 as an "atypical year" in this connection. We note, also, that in other contexts the majority are quite prepared to rely on 1970's experience where it suits their purpose.

[9] It should be said, however, that the record gives little or no support to this contention of the carriers. On the contrary, it would appear that if anything it has been the more profitable carriers which have suffered the longest and most costly strikes, although the correlation between profitability and strike losses is certainly low. (See I.D., Appendices C through G.)

and involves a considerable degree of speculation. It is surely significant that the participating carriers have never been able to agree among themselves on a valid measure of post-strike losses, so as to permit their direct compensation under the Mutual Aid Agreement. Clearly a great many factors go into determining how serious post-strike losses will be; a struck carrier will presumably regain its normal level of traffic more quickly in monopoly than in competitive markets, and in the latter it will make a great difference whether its principal competitors were also struck or were operating. It is by no means clear from the record that prospective post-strike losses increase in any simple way in direct proportion to the length of a strike.[10] Accordingly, it might well happen that, once a strike commenced, the struck carrier's management could believe that most of the prospective post-strike losses were already accrued and inevitable, and would not be greatly increased by a delay (within limits) in settling the strike.

We cannot demonstrate that any of these situations have in fact occurred since the 1969 amendments were adopted. As the record in this proceeding amply demonstrates, it is extremely difficult to sort out the underlying motivations in the various actions of the parties to a labor dispute, and attempts to do so are seldom profitable. All that can be said with reasonable confidence is that such situations *can* occur, and that when they do the monetary incentives for carrier management to settle a strike as soon as reasonably possible will be seriously weakened.

We do not ignore the other institutional incentives which militate for each settlement of a strike. But labor disputes

[10] For example, the cost of requalifying pilots appears to be an either-or proposition which, once incurred, does not increase with the further prolongation of the strike. Similarly, post-strike traffic demand will be profoundly influenced by seasonal factors.

are not feasts of pure reason; strong human emotions are frequently generated, even in men charged with managing giant organizations. Thus, in the interests of minimizing disruption due to strikes, it is desirable that there always be strong financial motives on both sides for the prompt settlement of disputes, both prior to a strike and after one has begun. We agree with the administrative law judge that the 1969 mutual aid amendments, by making it possible for a struck carrier to show an operating profit during the strike period, go too far in reducing the financial incentives for carrier management to settie a strike promptly once it has begun.

We also agree with the judge—though this in our view is a lesser factor—that the increased liability of participating carriers to pay supplemental benefits under the 1969 amendments poses an unacceptable threat to the financial stability of the paying carriers. As the judge pointed out, the defect of the Agreement's provision for supplemental payments is that it takes no account of the current financial condition of a paying carrier; and, indeed, the bulk of the mutual aid payments since the 1969 amendments took effect have been to otherwise highly profitable carriers from carriers who were currently either losing money or earning less than a reasonable return on investment.

The 1969 amendments' increase in the level of and ceiling on supplemental payments markedly aggravates the ability-to-pay problem which existed under the prior agreement. In an 18-month period under the 1969 amendments nearly as much ($83.6 million, 60 percent of it in supplemental payments) was paid out under the Mutual Aid Agreement as in the preceding 8 years ($87.7 million, only 22 percent of it in supplemental payments). During the same 18-month period over $10 million in mutual aid pay-

ments (nearly 80 percent supplemental) were assessed against Pan American, a carrier whose operating losses were and have continued to be so substantial as to occasion serious Board concern.[11] Particularly in view of the potentially adverse effect on carrier incentives created by the increased supplemental benefits payable under the 1969 amendments, we think the price to those participating carriers already in financial difficulties is too high to be in the public interest.

The remaining issue which we do not consider to have been adequately dealt with is that of Railway Labor Act violations occurring after a strike has begun. The union parties call to our attention the fact that, in the course of the Northwest-BRAC strike in 1970, a U.S. District Court in Minneapolis ruled that Northwest had violated the Railway Labor Act by offering improper inducements to certain of its striking employees to quit the union. A temporary injunction was issued.[12] This violation took place after the strike had begun, and thus by definition could not have had anything to do with causing it. However, the union parties assert that the violation resulted in prolonging the strike because, after agreement was reached on the economic issues which were the strike's cause, the carrier insisted on including in the back-to-work agreement provisions which the unions contended would require them to ratify the carrier's Labor Act violations.

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[11] Pan American's over $10 million in mutual aid payouts during this period contrasts with the less than $10 million in revenue diversion from this carrier which, a majority of the Board recently held, posed so great a danger to the carrier's financial integrity as to require disapproval of a route acquisition agreement between two other carriers. *Eastern-Caribair Acquisition Agreement*, Order 72-10-80, October 30, 1972.

[12] No final adjudication was had in this court case, which was dismissed by agreement of the parties upon settlement of the strike.

In its prior approvals of the Mutual Aid Agreement, the Board has always placed great stress on the provision of the Agreement limiting the class of cases in which benefits are payable to those, *inter alia*, where a strike has been called in the absence of a Presidential emergency board "and the struck party has in all respects acted in compliance with the Railway Labor Act."[13] We agree that, if the Agreement is to be approved at all, it is essential that mutual aid not be payable where a strike has resulted from a carrier's violation of the Railway Labor Act.

The Northwest-BRAC strike incident, and another apparently similar incident during the more recent Air West-AMFA strike,[14] raises for us the question of whether mutual aid should continue to be paid in the event a carrier violates the Railway Labor Act after a strike is called, at least where the violation results in prolonging the strike. Although the above-quoted language of the Agreement is not completely free of ambiguity, it appears only to require compliance with the RLA by a struck carrier up to the time the strike is called, and not thereafter.[15] This

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[13] Agreement, paragraph 1.(A)(ii); see I.D., Appendix A, p. 2.

[14] Press accounts (*Aviation Daily*, January 11, 1973, p. 58) indicate that a National Mediation Board arbitrator has recently ruled that Air West violated the Labor Act in certain respects after its strike began. Whether this violation arguably prolonged the strike is unknown. There is nothing in the present record concerning this incident, which occurred after the record was closed.

[15] The majority apparently think otherwise; they state (Opinion, p. 16) that, "Should the carrier fail to bargain in good faith *in negotiations for settlement of a strike*, and hence be in violation of the Railway Labor Act, the carrier would not be entitled to Mutual Aid payments." (emphasis added) We are not informed as to the basis for this interpretation, which appears to be more of a dictum than a firm condition to approval of the Agreement; nor are we aware that the parties to the Agreement have ever so interpreted it. Perhaps this matter could be explored further on reconsideration, or better yet on the remand which we recommend.

suggests the possibility that the Board's approval of the Agreement should be conditioned so as to require continued compliance with the Labor Act after a strike is called.

This issue seems to us to be of sufficient importance to warrant further consideration by the Board. We do not think it can be adequately dealt with on the present record. The Northwest-BRAC strike incident was litigated, but only in a somewhat desultory way; we do not have the benefit of findings thereon by the administrative law judge.[16] The Air West-AMFA strike occurred after the record here was closed, and thus has not been explored in the hearing process. Otherwise, there has been little discussion of post-strike-commencement RLA violations, and virtually none of the problems which might be encountered in conditioning the Agreement in the manner we have suggested, or of the precise form and scope of such a possible condition. Accordingly, we would remand the proceeding to an administrative law judge to take further testimony and present a new initial decision discussing the problems of, and possible remedies for, post-strike-commencement Labor Act violations.

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[16] The majority's attempt to dispose of the Northwest-BRAC incident in a footnote (Opinion, p. 16, note 15) seems to us entirely unsatisfactory. We do not believe the record has been sufficiently well developed on this point to permit a determination of whether the RLA violation found by the court did or did not, in conjunction with other actions of the carrier, directly or indirectly contribute to prolonging the strike. (We recognize that the mediator's report attributes the continuation of the strike after the economic issues were settled principally to other factors, but that is not necessarily decisive for present purposes.) The majority's attempt to shrug off the violation even if it did prolong the strike is unexplained, and seems wholly arbitrary. As for the distinction, obscurely suggested by the majority's footnote, between failure to bargain in good faith and other types of RLA violations, we see no comprehensible basis for such a distinction, which is not suggested by any earlier Board opinion relating to the Mutual Aid Agreement. Only further exploration upon a remand, in our view, can resolve these ambiguities and obscurities.

Order 73-2-110

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C. on the
27th day of February, 1973

AIRLINES MUTUAL AID AGREEMENT

Docket 9977
Agreement CAB 21445
21445A1
21445A2
21445A3

Order

A full public hearing having been held in the above entitled proceeding, and the Board, upon consideration of the record having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That Agreement CAB 21445, as amended by Agreements CAB 21445A1 through A-3 (hereinafter referred to as the "Agreement"), be and it hereby is approved, for a period of five years, subject to the following conditions:

(a) The approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act;

(b) The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

(c) Approval of participation in the Agreement by each carrier party thereto is subject to the condition that no payment or obligation incurred pursuant to the Agreement shall be claimed as an expense for purposes of computing the need of such carrier for compensation payable by the Board under section 406 of the Federal Aviation Act; nor shall any carrier be entitled to receive any compensation payable by the Board for payments made or obligations incurred by that carrier pursuant to the Agreement;

(d) In accounting for the amounts due to others and the amounts due from others under the Agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by Part 241 of the Economic Regulations (Uniform Systems of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the Agreement as may be reasonably required by the Director of the Board's Bureau of Operating Rights: and

(e) Copies of all arbitrators' decisions and awards issued under this Agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the

arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

2. That except to the extent granted, the application and all other requests herein, be and they hereby are denied or dismissed.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Acting Secretary

(SEAL)

Opinion

INITIAL DECISION OF EXAMINER ARTHUR S. PRESENT

Preliminary Statement

This is another stage of the *Mutual Aid* case which has been before the Board intermittently since 1958. The original agreement among six trunkline air carriers providing for mutual aid in the event of a strike, effective for one year, was approved by the Board after receiving statements from interested persons and hearing oral argument.[1] The parties to the agreement later sought approval of its renewal, as amended, and approval was granted, after a full evidentiary hearing, for a period of three years.[2] The agreement was most recently approved in 1970, again after an evidentiary hearing.[3]

In the last-referenced order, the Board not only approved the agreement in its form at the time of the evidentiary hearing, but the Board also approved amendments to the agreement effective as of October 31, 1969,[4] after the hearing had closed and the Examiner's initial decision had been rendered. On reconsideration, the Board withdrew its approval of the 1969 amendments because they had not been exposed to the evidentiary hearing process.[5] The Board said:[6]

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[1] *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168 (1959), *reconsideration denied*, 30 C.A.B. 90 (1959).

[2] *Mutual Aid Pact Investigation*, 40 C.A.B. 559 (1964).

[3] *Airlines Mutual Aid Pact*, Order 70-7-114, July 23, 1970.

[4] Agreement CAB 21445.

[5] Order 70-11-110, November 23, 1970.

[6] *Id.* at 2.

> We are not presently persuaded that our earlier determination was in error. However, in fairness to the parties and to ourselves, we believe that we should reserve making a final judgment in this important matter until we have before us a fully developed record on the current facts, with all parties afforded an opportunity to present their evidence and arguments and to be fairly judged on that evidence and these arguments. [Case cited] Accordingly, we will remand the matter for the taking of further evidence with respect to the amended agreement on events which occurred since the close of the earlier hearing.[6]

[6] *Inter alia*, the Board desires evidence as to the agreement's role, if any, in affecting the bargaining balance between labor and management in the air transportation industry. In addition, in the event that we reach a different ultimate conclusion on the merits of the amended agreement, we will nevertheless give consideration to whether our action should be prospective only.

In December 1970, shortly after the issuance of the Board's order, the agreement was again amended, to permit local service carriers to become parties.

After the completion of preliminary steps and due notice, public hearing was held in November 1971. The parties to the proceeding are the applicants (the Trunkline Carrier Parties[7] and the Local Service Carrier Parties),[8]

[7] American Airlines, Inc.; Braniff Airways, Inc.; Continental Air Lines, Inc.; Eastern Air Lines, Inc.; National Airlines, Inc.; Northwest Airlines, Inc.; Pan American World Airways, Inc.; Trans World Airlines, Inc. (TWA); United Air Lines, Inc.; and Western Air Lines, Inc.

[8] Hughes Air Corp. d/b/a Air West; Frontier Airlines, Inc.; Mohawk Airlines, Inc.; North Central Airlines, Inc.; Ozark Air Lines, Inc.; Piedmont Aviation, Inc.; and Texas International Airlines, Inc.

the Six Union Parties,[9] the Air Line Pilots Association, International (ALPA), the Allied Pilots Association (APA), the Aircraft Mechanics Fraternal Association, Locals 24 and 32 (AMFA), Allegheny Airlines, Inc., the Department of Transportation, and the Board's Bureau of Operating Rights (Bureau). Briefs have been filed,[10] and the case stands ready for decision.

One procedural matter requires disposition. The Local Service Carrier Parties have filed a motion to strike an affidavit attached to the joint brief of APA and AMFA and argument in the brief thereon, specifically the third and fourth sentences on page 4, the second sentence of the first paragraph beginning on page 5, and the third full paragraph on page 7. They contend that the record is closed, that the affidavit can be received as evidence only if the record should be reopened, and that there are no valid grounds for taking such action. If the affidavit should be given evidentiary status, the Local Service Carrier Parties ask that the Examiner grant equal status to an affidavit attached to its motion.

The affidavit appended to the APA/AMFA brief is by the national director of AMFA and concerns the AMFA strike on Air West which began December 15, 1971. As pointed out by the Local Service Carrier Parties, the record is closed. No showing has been made that reopening the record to receive AMFA's affidavit is necessary or war-

[9] Air Line Dispatchers Association; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC); Communication Workers of America; Flight Engineers International Association (FEIA); International Association of Machinists and Aerospace Workers (IAM); and Transport Workers Union of America (TWU).

[10] Briefs were filed on behalf of all the parties except Allegheny and the Department of Transportation.

ranted to assure an adequate record or to meet the ends of justice. On the contrary, to bestow evidentiary status on the affidavit at this juncture would tend to impair the orderly conduct of the Board's business. Therefore, the motion to strike shall be granted.

Background

As has been indicated, the Board remanded this proceeding to take evidence on events which transpired since the close of the earlier hearing. Accordingly, the focus of this remanded proceeding has been on such events in relation to the October 1969 and December 1970 amendments. However, in order to gain perspective, it may be helpful briefly to review the history of mutual aid.[11]

Initial Agreement

The concept of mutual aid had been under consideration by the major carriers at least since 1957. It was engendered by dissatisfaction with the functioning of the Railway Labor Act.[12] The initial agreement was triggered by a strike on Capital Airlines, Inc., by IAM beginning October 17, 1958. The labor dispute also embraced other trunkline carriers. Capital appealed to other large carriers for financial assistance. A one-year agreement was reached among six carriers—American, Capital, Eastern, Pan American, TWA, and United—effective October 20, 1958. The objective of the agreement was stated in the preamble to be "to bring about sound and reasonable economic conditions that will be of benefit to the air transport industry

[11] The agreement in its present form is set forth in Appendix A.

[12] 45 U.S.C.A. 151 *et seq.*

and to the public" in the face of "extreme and unreasonable demands made by representatives of certain of the classes and crafts of their employees".[13] The mechanics devised to achieve this goal were "windfall" payments, that is competing carriers would return to the carrier on strike the increased revenues such carriers gained attributable to the strike less the added direct expenses of transporting the diverted passengers. It appears that the reasoning behind this approach contemplated minimizing the leverage which the striking employees might otherwise gain from the loss of revenues during the course of the strike by the strike-bound carrier.

The Board approved the agreement subject to certain conditions, announcing, " * * * the basic agreement cannot be found to be adverse to the public interest or in violation of the Act."[14] The Board explained, "In performing our statutory function, we may do no more than measure the agreement against these standards [the standards of section 412(b) of the Federal Aviation Act of 1958, as amended][15] in order to ascertain whether its effect would be so detrimental as to endanger achievement of the objectives laid down by section 102 of the Act. Within this framework, the Board's order follows from the lack of any affirmative showing that the agreement is adverse to the objectives specified by the Congress."[16]

Four additional carriers joined the agreement in 1960—National on March 11, Braniff on March 14, Northwest on

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[13] 29 C.A.B. at 190.

[14] *Id.* at 170.

[15] "The Board shall by order * * * approve any * * * agreement * * * that it does not find to be adverse to the public interest, or in violation of this Act; * * *."

[16] 29 C.A.B. at 177. Footnote omitted.

March 18, and Continental on April 4. However, National withdrew effective December 31, 1961. Capital, the carrier serving as the catalyst for the agreement was merged into United, effective June 1, 1971, the Board finding that Capital was a "failing business."[17]

During the period the terms of the initial agreement were in effect there were 15 strikes on mutual aid carriers lasting a total of 418 days,[18] or an average of approximately 28 days per struck carrier. A total of $16,160,000 passed among the carriers pursuant to the agreement.[19]

1962 Amendments

The parties to the agreement amended it and, as amended, sought Board approval for an indefinite period. Insofar as pertinent here, the principal amendments injected the "standard amount" as a means of supporting struck carriers. Thus in the event the "windfall" payments did not equal 25 percent of the normal air transport operating expenses of the flight operations shut down, "supplemental" payments would be made up to that level. The 25 percent level was considered reasonably related to the expenses which a carrier might be expected to incur during the period it was suffering a strike. The obligation to make "supplemental" payments is not related to any competitive financial benefit to the nonstruck carriers. However, the liability of each carrier in any one calendar year to make "supplemental" payments was limited to one-half of one

[17] United-Capital Merger Case, 33 C.A.B. 307 (1961), certificates reissued, 34 C.A.B. 725 (1961).

[18] Based on Appendix C to the Examiner's initial decision served March 7, 1969. Where, embraced within the same period of time, there was more than one group of employees on strike on a given airline, only one strike is counted.

[19] Appendix B.

percent of its air transport operating revenue for the previous calendar year.

The carrier parties advanced three principal reasons for adding "supplemental" payments to the agreement. They contended that the "windfall" payments, in most instances, were not sufficient to protect the carriers against the full brunt of union economic pressure. They also noted that several major competitive carriers were not parties to the agreement and their adherence appeared unlikely. Finally, alluding to the jurisdictional dispute between ALPA and FEIA then in progress, they alleged that several of the major transport unions did not exercise restraint in the use of their strike power and that this attitude was expected to continue.

The Board approved the amended agreement, stating:[20]

> * * *. Our examination of the record, compiled in an exhaustive and thorough investigation, leads us to the view that the Pact meets the tests of section 412 and that it is not adverse to the public interest objectives of the Act, but that on the other hand is consistent therewith.
>
> Air carriers are particularly vulnerable to strikes, and the industry has, in the recent past been plagued by strikes. The Pact offers, at a not unreasonable cost for the protection obtained, a substantial measure of relief against the costs of strikes, in this fashion and to this extent contributing to industry stability.

However, contrary to the request of the applicants, the Board limited its approval to three years because, "The years since creation of the Pact have not been typical either

[20] 40 C.A.B. at 561.

as to the industry, plagued with a capacity problem, or labor-management relations, preoccupied with the crew complement issue, and for this reason we shall limit approval to a period of 3 years."[21]

Continental withdrew from the agreement as of December 31, 1966.

The agreement contained the 25 percent "supplemental" payment provision from 1962 to October 1969. During this period there were 11 strikes against carriers party to the agreement.[22] These strikes involved a total of 292 strike days,[23] or an average of 27 days per struck carrier A total of $87,740,000 was paid and received under the agreement, of which total 22 percent comprised "supplemental" amounts.[24]

Previous Proceeding and Events Leading to Present Proceeding

Upon the expiration of the three-year term of approval, the carriers sought renewal of the approval for an indefinite period. The Hearing Examiner issued an initial decision granting the application.

Subsequent to that decision, in October 1969, the carriers amended the agreement, among other things, raising the "supplemental" payments level and making entry into the agreement easier and exit from it harder.

At first, the Board approved the agreement both in the form litigated before the Examiner and as later amended.[25] The Board basically adopted the Examiner's findings

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[21] *Id.* at 563. Footnote omitted.

[22] This excludes a five hour strike against Northwest in June 1969.

[23] Appendix C to March 7, 1969, initial decision and Appendix C hereto.

[24] Appendix D.

[25] Order 70-7-114, *supra.*

that the agreement was consistent with national labor policy, contributed to airline stability, had had little, if any, impact on labor-management relations, and had not been shown materially to affect the collective bargaining process. The Board also held that, although the amendments to the agreement strengthened it, they did not change the basic nature of the agreement or add any element that rendered it adverse to the public interest.

On reconsideration,[26] for reasons described earlier herein, the Board vacated its order, to the extent the order approved the agreement, as amended, and remanded the proceeding to the Examiner.

In December 1970, the agreement was further amended to permit participation by local service carriers on the same terms as the trunkline carriers.

As a consequence of the amendments regarding entry into the agreement, Continental and National rejoined effective November 15, 1969, and Western became a member as of August 3, 1970. Delta Air Lines, Inc., and Northeast Airlines, Inc., are the only trunkline carriers not parties to the agreement.

The local service carrier amendments brought Air West, Frontier, Mohawk North Central, Ozark, and Piedmont into the agreement as of January 1, 1971. Texas International joined effective October 5, 1971. The only local service carriers not adhering to the agreement are Allegheny and Southern Airways, Inc.

Two groups of amendments are the center of inquiry, the October 1969 and the December 1970 amendments.

The October 1969 amendments contain five principal features. First, the "standard amount" of payments is increased from 25 percent to a range of 35 to 50 percent of

[26] Order 70-11-110, *supra*.

the struck carrier's normal air transport operating expenses, in decreasing ratio as the length of the strike grows.[27] Second, the annual maximum liability of every party to the agreement is enlarged from one-half percent to one percent of its air transport operating revenue for the previous calendar year. Third, the conditions for entry into the agreement were modified to permit any trunkline carrier to become a party by November 15, 1969, without a waiting period or back payment. Fourth, the provisions for withdrawal from the agreement were amended so that the time period for notice of withdrawal was lengthened from 60 days to one year. Fifth, the arbitration clause was extended to subject the amounts of payments to arbitration in the event of a dispute. Previously, only disputes over the requirement to make or the right to receive payment was subject to arbitration.

The December 1970 amendments opened participation in the agreement to local service carriers on the same terms as the Trunkline Carrier Parties. The amendments, as originally executed, did not cover existing strikes. But, upon the request of Mohawk, the amendment was altered so that Mohawk would receive mutual aid beginning January 1, 1971, with respect to the strike it had been suffering since November 12, 1970. The Trunkline Carrier Parties acceded to the change because they considered Mohawk to be in the same position held by Capital when the agreement was initially made.

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[27] The "standard amount" is equal to the following percentages: (a) during the first 14 days following commencement of the strike, 50 percent of the struck carrier's normal air transport operating expenses; (b) during the next seven days, 45 percent; (c) during the following seven days, 40 percent; and (d) during any subsequent period, 35 percent.

Opinion

As explained by the Trunkline Carrier Parties in their brief, the increase in payment levels had two purposes. The first was to improve the protection afforded struck carriers in view of (1) the growing losses suffered by struck carriers at the 25 percent level, and (2) the deterioration of the carriers' ability to withstand losses. The second purpose was to strengthen the carriers' credibility in labor negotiations in the hope that there might be some tempering of union demands and thus some alleviation of the trend toward ever more costly and inflationary settlements. The annual maximum liability for supplemental payments was raised to finance the higher payment levels. The Trunkline Carrier Parties assert that the adherence clauses of the agreement were changed because, by broadening the membership, the "windfall" aspects of the agreement would be strengthened and reliance on "supplemental" payments would be reduced. In addition, the parties to the agreement believed carriers not parties to the agreement were in a position of special vulnerability to demands for even higher settlement levels which would impair their viability and result in destructive precedents for the parties to the agreement. The changes to the withdrawal provisions emphasized the long-run commitments of parties to the agreement. The Trunkline Carrier Parties state that arbitration terms were altered because there seemed no good reason not to provide for arbitration of questions concerning the amount of payments as well as the right to receive payments.

The Trunkline Carrier Parties note that the Board's decision of July 1970 had an influence on their decision to allow local service carriers to join the agreement. Mohawk and North Central had asked the Board to withhold approval of the agreement until steps were taken to assure

participation by the local service carriers. The Board denied the request "without prejudice to any future agreement of this nature which may be filed.[28] Furthermore, in a concurring statement, Chairman Browne declared, "Mohawk and North Central are free to bring the issue before the Board at a later time if the trunkline carriers fail to afford them the proper consideration." The Trunkline Carrier Parties state that they desire to have the local service carriers participate in the agreement for the same reasons they want the agreement and they think further broadening the coverage should make the agreement more effective. The Local Service Carrier Parties claim they have fully as great a need as the Trunkline Carrier Parties for the protection against strike losses afforded by the agreement.

Since the October 1969 amendments became effective, there have been four strikes affecting members of the agreement.[29] There was a 116-day strike conducted by the Air Line Employees Association (ALEA) against National from January 31, 1970; a 160-day strike by BRAC against Northwest from July 8 to December 14, 1970; a two-day strike by the Air Line Stewards and Stewardesses Association against TWA from October 19 to October 21, 1970; and 154-day strike by ALPA against Mohawk from November 12, 1970, to April 14, 1971. With respect to the last-mentioned strike, 50 days occurred prior to Mohawk's entry into the agreement and 104 days thereafter. The four strikes involved 382 strike days while the struck carriers were members of the agreement, an average of 95 days per struck carrier. Mutual aid receipts and payments totaled $83,585,000[30] of which 59 percent constituted "supplemental" payments.

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[28] Order 70-7-114, Opinion, p. 16.

[29] This does not count the strike called by AMFA against Air West beginning on December 15, 1971, after the hearing ended.

[30] Appendix E.

Opinion

Positions of Parties

Approval of the agreement, as amended in 1969 and 1970, is supported by the Trunkline Carrier Parties, the Local Service Carrier Parties, and the Bureau. The carriers request approval for an indefinite period with no conditions attached other than those imposed with regard to the preceding agreement. The Bureau recommends that the Board's approval be limited to five years.

All the unions oppose both the 1969 and 1970 amendments and ask for disapproval of the amended agreement. The Six Union Parties expressly request that the disapproval be retroactive. Even if the October 1969 amendments should be approved, the Six Union Parties maintain that participation by local service carriers should be excluded.

Discussion

The history of the mutual aid agreement reflects a constant search for elusive and perhaps unattainable goals. The carriers participating in the mutual aid agreement have sought to shore up their financial positions in relation to union strike activity and to cause the airline unions to moderate their demands. The escalation of mutual aid protection over the years signifies that the carriers believe they have gained their objectives only in part, at best.

Board approval in the past has rested fundamentally on the principle that mutual aid is a legitimate means of self-help in accordance with our nation's labor policy and on the lack of any showing that the agreement was detrimental to the policy objectives of the Act set forth in section 102. In addition, the Board found that the agreement enhanced airline stability and, therefore, was consistent with the aims of the Act.

Whatever the earlier accomplishments of mutual aid may have been, the 1969 and 1970 amendments have shifted the balance away from favoring approval of the agreement as it now stands. Thus, the present level of benefits creates a real possibility of a party to the agreement, particularly a weak airline, prolonging a strike for short-term benefits, to the detriment of the traveling and shipping public. Moreover, such level heightens the danger that airlines contributing to the struck carrier may be significantly weakened and thereby impair their public service obligations.

Accordingly, after careful consideration of the evidence of record and the contentions of the parties, the Examiner is persuaded that the amended agreement should be disapproved to the extent the "standard amount" exceeds 25 percent and a contributing carrier's liability in relation to the "standard amount" could be greater than one-half of one percent of its prior year's air transport operating revenues. In addition, local service participation should be eliminated. Finally, the agreement should be amended so that the decision herein would operate prospectively and not apply to mutual aid receipts and payments occurring prior to the effective date of this decision.

Amount of Strike Losses Covered by Agreement

The evidence discloses that the agreement prior to the October 1969 amendments was accomplishing one of its goals; it was adequately covering losses suffered by a carrier during the course of a strike. For example, American was struck by TWU during the period February 27 to March 19, 1969. Taking into account mutual aid, American incurred an estimated loss of $5.6 million before income taxes. Since depreciation and amortization made up $5.3

million of its expenses,[31] the carrier's cash loss was in the neighborhood of $300,000. The $20,311,000 received by American in mutual aid was comprised completely of "windfall" payments. With no resort to "supplemental" payments, mutual aid covered 82 percent of American's operating expenses including depreciation and amortization. Pan American was struck by the International Brotherhood of Teamsters (IBT) from August 9 to 12, 1969. In this situation, as a result of mutual aid receipts amounting to $1,688,000, and although it incurred approximately 56 percent of its estimated normal operating expenses during the strike period, the carrier had an estimated net profit before income taxes of $619,000 after charging $1.1 million of depreciation and amortization to expenses.

The carriers maintain, however, that the losses suffered during the course of a strike are only a portion of the losses incurred by a struck carrier. They assert that before the strike and particularly after the strike has been settled the struck carrier continues to acquire losses[32] because of such factors as start-up costs and diversion of passengers to other carriers. In relation to the TWU strike against American, it is estimated that the post-strike losses for the period March 21 to April 30, 1969, were $11.4 million.[33]

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[31] ALPA contends that the carriers should not be charging depreciation and amortization to expenses when they are not operating. It is unnecessary to pass on ALPA's contention.

[32] By losses it is meant that the post-strike financial results are less satisfactory than would have been the case if there had not been a strike.

[33] It might be noted, however, that in 1969, despite the strike, American realized a net income after special items of $38,468,000, some $3 million higher than in 1968, a year in which no party to the agreement endured a strike.

The estimate is that Pan American lost $2.1 million for the period of August 1969 after operations were resumed.[34] In the cases of National and Northwest, the carriers estimate that, at the 25 percent level, only 40 percent of National's and one-third of Northwest's strike and post-strike losses would have been covered. They maintain that, in the case of the 43-day strike by IAM in 1966 against Eastern, National (not a pact carrier at the time), Northwest, TWA, and United, the "supplemental" payment fund was exhausted almost immediately and the struck carriers recovered only between 14.7 percent and 30.7 percent of their strike losses.

There is no denying that the higher level of benefits bolsters a struck carrier, but the Trunkline Carrier Parties have made no showing that an increase in mutual aid benefits was required to maintain the stability of any of the carriers involved in these strikes. Certainly, the record does not indicate that the 1966 experience established a need for a higher level of payments. As shown in Appendix F, the carriers struck by IAM realized rates of return on investment in 1966 ranging from 7.30 percent by Eastern to 21.88 percent by Northwest. National, which did not belong to the mutual aid agreement at the time, enjoyed a

[34] The Trunkline Carrier Parties assert that no significant questions were raised at the hearing concerning the procedure followed in determining post-strike losses and the reliability of the carrier strike loss exhibits is not subject to challenge. There can be little doubt that a strike produces an adverse post-strike impact on a carrier, but there is no need to evaluate the validity of the carriers' post-strike loss projections. However, if there were any merit in the claim of the Trunkline Carrier Parties that Northwest's own computation shows only a "paper profit" during the course of the strike (brief, p. 30, second footnote), when that computation is based on actual experience, it would raise a substantial question as to the description and weight, if any, to be accorded the carriers' estimates of post-strike losses, since such estimates reflect a hypothetical situation.

rate of return on investment of 15.87 percent. Indeed, it was not until a meeting among pact members held on August 7, 1969, that the proposal was made to raise the "standard amount". The record is silent as to the events which prompted this meeting, but the meeting was held during the course of the IBT strike on Western (not then a pact member) and just two days prior to the IBT strike against Pan American.

It is evident that in increasing the "standard amount" the Trunkline Carrier Parties have expanded their goal from merely covering strike period losses to meeting, to some extent, post-strike losses as well. The evidence indicates that during a full shutdown a struck carrier can limit its operating expenses to 29.2 percent of the normal level. Under the current agreement, the lowest limit covered is 35 percent and that rate is not reached until the fifth week of the strike. The witness for the Trunkline Carrier Parties who explained the purpose of the amendments testified that in deciding upon the increase the carriers retained the method of calculating mutual aid on the basis of the strike period but were trying to compensate to some degree for the total costs of the strike. The actual financial results during four strikes on carrier parties to the agreement since the October 1969 amendments are consistent with this evidence.

National, although it conducted no operations during the approximately four-month strike by ALEA, with the aid of mutual aid receipts amounting to $27,985,000, earned, during the strike period, net income of $810,000 after $8.4 million in charges for depreciation and amortization.

Northwest, which during the five-month strike by BRAC conducted an average of about 29 percent of its operations,

achieved a net profit before income taxes of $17.9 million during the strike period after deducting $32.8 million in charges for depreciation and amortization. The carrier's mutual aid receipts totaled $47,287,000.

TWA incurred a net loss before income taxes of $879,000 during the two-day strike to which it was subjected in October 1970. That result reflects charges for depreciation and amortization in the amount of $621,000 and mutual aid receipts of $2,452,000. The carrier maintained about 25 percent of its operations during the two days. However, TWA estimated that, if it had not suffered the strike, it would have lost $1,687,000 during the two-day strike period, so that the carrier actually gained $808,000 for the period of the strike.

Mohawk received mutual aid for the first quarter of 1971. It conducted no operations during the strike and received no subsidy for that period. Yet, it had a net profit of $29,000 for this quarter after taking into account $1.8 million in depreciation and amortization and $1.4 million in nonoperating expenses.[35]

Impact of Increased Mutual Aid on Union Demands

The October 1969 amendments have made greater financial support available for struck carriers. However, the other part of the dual objective has not been achieved, that is, the unions have not moderated their demands (at least not significantly) as a consequence of the increased mutual aid. The record is replete with evidence demonstrating the failure of mutual aid in this regard.

The chief labor relations official of National from 1948 through June 30, 1971, testified, with respect to the 1970

[35] This calculation is predicated on mutual aid receipts of $6,170,000 per Exhibit MO-6, p. 3. However, mutual aid payments to Mohawk appear to have totaled only $5,861,000. See Appendix E.

ALEA strike, that the carrier regarded the demands of the union very excessive and the union conduct during the course of the strike as counterproductive. He said that National would have taken the strike even if the carrier were not a party to the mutual aid agreement. Furthermore, he testified that National's membership in the pact did not affect the substance of the settlement made with ALEA. As set forth in the following testimony, this official was astonished at the fortitude of the employees during the course of the strike:[36]

> Q. Mr. Rosenthal, if you know, and it will appear to be a related question, but it is slightly different, what in your opinion enabled ALEA in their position or in your experience, enables other unions to hold out for so long during a work stoppage?
>
> * * * * *
>
> A. In the ALEA dispute, it was a matter of amazement to me. I don't know how they were able to hold out. They did not get strike relief, and yet they did hold out.

In spite of the assistance of mutual aid, this witness characterized the settlement with ALEA as "reasonable-plus", meaning "a settlement which may have been a little less than that would have fallen in the category of reasonableness."[37]

Similarly, Northwest's vice president-personnel, commenting about the BRAC strike, said:[38]

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[36] Tr. 219-220.

[37] Tr. 200.

[38] Trunkline Carrier Exhibit No. 23, p. 12.

> Although the Mutual Aid Agreement provided vital financial protection to Northwest during this long and devastating strike, it had nothing whatsoever to do with the existence or duration of the strike, and it played no part in negotiations before or during the strike.

Accenting this statement, the official testified that Northwest considered the BRAC demands so unreasonable the carrier's position probably would have been the same even in the absence of any mutual aid.

Speaking on behalf of Eastern, in response to a question regarding the effectiveness of the increased payments provided under the October 1969 amendments, a witness said:[39]

> Well, it obviously has not been very effective, because the settlements are still inflationary, the most reasonable ones we have.
>
> But what I do say is that we are an extremely vulnerable industry and unless we can strengthen the hand of the carrier in negotiations, you will have even more inflationary settlements than we have had.

It is also significant that the National, Northwest, and Mohawk strikes were three of the longest strikes in the airline industry. Indeed, the strike against Northwest was the longest strike against a party to the mutual aid agreement, that against Mohawk was the second longest, and the strike against National the fourth longest, exceeded only by a 137-day strike by IAM against Northwest from October 11, 1960, to February 24, 1961.

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[39] Tr. 143.

The Trunkline Carrier Parties even concede in their brief that the increased level of payments has been ineffective in inducing the unions to moderate their demands. They said,[40] "Recent settlement levels and the circumstances of the strikes described in the record dispel any notion that the unions will moderate their demands to conform to reduced carrier ability to pay." They commented further:[41]

> *** ALPA Exhibit 20 shows greater increases in employee compensation since Mutual Aid than before and dramatically greater increases since the 1969 Amendments. Moreover, updated versions of exhibits introduced at the earlier hearing show that airline employees not only continue to lead employees in all other major domestic industries in average hourly wages, but have increased their margin in both absolute and percentage terms.

Nevertheless, the Trunkline Carrier Parties argue that these experiences do not prove that the increased level of payments is without impact on the bargaining process. They contend that the National and Northwest strikes were controlled by the supervening influence of inter-union rivalry. Furthermore, they claim that the unions are likely to increase their demands when they conclude that a hard-pressed carrier is in no position to resist them. The Trunkline Carrier Parties aver that settlements since the 1969 amendments, generally involving lucrative increases in compensation, were made at a time of inflationary settlements throughout the economy, and they speculate that the settlements might have been even higher in the absence of

[40] Brief, p. 32.

[41] Brief, pp. 37-38.

the amendments. They furthur conjecture that the tempering effect on union demands caused by improvement in the airlines bargaining credibility is likely to be felt over the long run.

It is apparent that the arguments of the Trunkline Carrier Parties on the moderating effect of increased mutual aid do not rest on the long experience under the mutual aid agreement but on pure surmise. In the light of the objective evidence, their contentions cannot be accepted.

There can be little doubt that inter-union rivalry presently affects carrier-labor relations particularly with respect to ground employees. But the record shows that inter-union rivalry is not a new feature in carrier-labor relations. As the Trunkline Carrier Parties themselves point out, the ALPA-FEIA controversy lasting from 1958 to 1962 was an aspect of that contest. Furthermore, with or without increased mutual aid, the carriers will continue to be confronted with the problem of inter-union factionalism in the future.

The carriers have pointed to the Western-IBT strike in 1969 and the settlement thereof as an example of the use of a settlement on a carrier in poor financial condition as leverage for an even larger settlement in bargaining with other carriers. However, Western is by no measure a weak carrier. Rather, the data show that it ranks among the more profitable carriers and that it is having a satisfactory recovery from the economic recession which hit the industry in the past few years.[42] Moreover, even more

[42] See Appendix F. The Examiner in the *American-Western Merger Case* said, "[Western's] financial status is far removed from comparison with the distress situations that have previously come before the Board in merger cases. On the contrary, whether viewed in the absolute or in relation to the other domestic carriers, it would

pertinent, is Western's experience after it joined the mutual aid agreement. Western adhered to the agreement because the carrier felt that without the support of mutual aid it was too vulnerable to strikes and excessive union demands. The carrier considered the increases it granted as a result of the IBT strike inordinate and as setting an adverse industry precedent. Nevertheless, on March 23, 1971, after it was a full-fledged pact member, Western signed an agreement with ALPA[43] which the Western witness described as "very highly favorable [for the pilots]. It is an inflationary settlement, very inflationary, which involves not only costs, direct costs, but loss of productivity."[44]

The Trunkline Carrier Parties urge that the Mohawk strike illustrates that unions are more likely to increase their demands where they conclude that a hard-pressed carrier is in no position to resist them. There is no probative evidence that ALPA's demands took into account Mohawk's financial condition. Nor does the contention of the Trunkline Carrier Parties square with such evidence as is available.

For example, analysis of rates paid as of December 31, 1971, pursuant to IAM agreements with Braniff, Continental, Eastern, National, Northeast, Northwest, TWA, and United does not demonstrate that Northeast, the weakest trunkline carrier, is a bellwether for union settlements.[45] In the category of lead inspector (only Northeast, North-

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have to be adjudged a very healthy company. While it had some basis for a less than rosy outlook in the months preceding the active negotiations with American it is now quite apparent any basis for concern was short lived." Recommended Decision, p. 35.

[43] There was no strike.

[44] Tr. 348.

[45] Northeast has not incurred a strike since 1958.

west, and TWA have that category), Northeast pays the highest rate, $6.20 per hour, and TWA the lowest, $6.12 per hour. But in the category of inspector, a classification on all eight carriers, Northwest pays the highest rate, $6.00 per hour, and Northeast the lowest, $5.87 per hour. In the mechanic-lead or crew chief group, of the eight carriers, Northeast pays the second lowest rate, $5.87 per hour. The highest rate is paid by National, Northwest, TWA, and United, $5.97 per hour. In the category called mechanic, Northeast and Eastern pay the lowest rate, $5.09 per hour, with National, TWA, and United paying the highest rate, $5.18 per hour.

It should not be overlooked that the longest strike against a mutual aid agreement member—the 160-day strike by BRAC against Northwest—occurred after the October 1969 amendments and was suffered by the carrier most relatively profitable of all the pact members.[46] And the 116-day strike incurred by National was called against another very profitable member.

At any rate, whatever the nature of the problems presented by carrier-union labor relations may be, the dilemma has not been circumvented through increased mutual aid.

Dangers of Increased Mutual Aid

Section 412(b) of the Act requires the Board to disapprove any agreement which the Board finds to be adverse to the public interest or in violation of the Act. In evaluating the public interest, the Board must consider, among other things, the factors set forth in section 102 of the Act. That section contains the congressional policy of promoting, encouraging, and developing our nation's air transportation system.

[46] Appendix F.

Up to this point, the discussion would not warrant disapproving the higher level of mutual aid. The increased level of mutual aid support for struck carriers helps buttress such carriers' financial stability and thereby contributes to the developmental purposes of the Act. The fact that such aid has not been effective in inducing unions to moderate their demands may be disappointing but that circumstance alone does not undercut mutual aid as a legitimate means of self-help under our national labor policies. However, a closer examination of the record in light of the Board's statutory obligations discloses that the increased level of mutual aid creates certain perils which may undermine the objectives of the Act. These risks are so serious as to justify disapproving the increased level of payments.

Potential Danger of Longer Strikes

The record indicates that mutual aid, even after the October 1969 amendments, has not been a significant factor in either a carrier's decision to suffer a strike, or during the course of a strike, its determination when to settle.[47] This situation prevails because mutual aid has been ineffective in achieving the goal of persuading unions to moderate their demands.

Nonetheless, the significant consideration is that the increased mutual aid is intended to encourage a carrier to incur a strike and to withstand union pressures during the course of a strike in order to avoid surrendering to what the carriers believe are unreasonable demands. As the Trunkline Carrier Parties' witness explaining the

[47] However, Mohawk's chief executive officer at the time of the strike conjectured that without mutual aid the carrier might have settled or elected the merger route sooner. There is no indication that the higher level of mutual aid flowing from the October 1969 amendments had any bearing on this testimony.

amendments said, "We also had in mind the necessity of increasing the amount of financial protection provided to a struck carrier so that it would be in a position realistically to resist unreasonable demands made under threat of a strike."[48]

Of course, no carrier is likely to protract a strike indefinitely because of the current level of mutual aid which is available. There are too many pressures[49] on a carrier to produce such a result.

But, in the short-run, a carrier can utilize the higher level of increased payments as a consideration in determining when it is opportune to settle a strike. One of the Trunkline Carrier Parties' witnesses testified that when a carrier commences operations after a strike it is largely a matter of the carrier's managerial judgment how rapidly it will return to full operations. An important circumstance in reaching this decision is the season of the year. This witness also stated that the carriers realize the availability of "windfall" payments during the post-strike period might affect a carrier's judgment regarding which flights it should resume first and constitutes one of the reasons the carriers have so far rejected direct mutual aid for that period.

These types of considerations are present during the course of a strike, and it is not far-fetched to conclude that, with the higher level of "supplemental" benefits now available, could influence management's judgment as to when it is timely to settle a strike. It was earlier noted that

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[48] Trunkline Carrier Exhibit No. 20, p. 5.

[49] Among these pressures are the adverse impact of a prolonged strike on the going concern capacities of the carrier, the increase in post-strike losses as the strike becomes more lengthy, and the urgings of governmental authorities, the traveling and shipping public, and nonstriking employees.

TWA was financially better off during the two-day strike it incurred in 1970 than if it had fully operated on those days. The really dramatic picture is shown when a weak carrier is involved. Thus, for the quarter ended March 31, 1971, the period for which Mohawk received mutual aid,[50] without any operations or subsidy the carrier enjoyed an operating profit of $1,445,000 and a net income after special items of $29,000.[51] In contrast, for the three months ended March 31, 1969, on the basis of its Form 41 reports, the carrier realized from its operations (including $592,000 in subsidy) an operating profit of only $890,000. Furthermore, after special items it suffered a net loss of $421,000.[52]

It is evident, therefore, that the higher level of mutual aid payments may sway a carrier's decision as to when it should settle a strike, to the detriment of the public utilizing air transportation.

Adverse Impact on Paying Carriers

The carriers complain that the unions, in formulating their demands, pay no heed to the financial condition of the carrier with which they are bargaining. The mutal aid

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[50] "Supplemental" payments comprised 93 percent of the total.

[51] The allegation of the Trunkline Carrier Parties and of the Local Service Carrier Parties that the continuation of the Mohawk strike after the carrier became a party to the mutual aid agreement cannot be attributed to mutual aid but rather stemmed from ALPA's refusal to compromise its demands further reflects the ineffectiveness of the increased level of mutual aid payments as a force influencing the unions to moderate their demands.

[52] Data for the first quarter of 1970 were not utilized for comparison purposes because Mohawk's operations were adversely affected by the controller sick-out in late March. For that quarter, Mohawk had an operating loss of $1,158,000 (after taking into account $476,000 in subsidy) and a net loss after special items of $2,570,000. It is noteworthy, nevertheless, how much better off Mohawk was when it suffered the strike.

agreement has the same kind of defect. It does not take into account the financial conditions of the receiving and contributing carriers. The record indicates no important attention was paid to this factor when the increased level of payments was discussed. Indeed, none of the carrier witnesses participated in studies of the financial impact of the increased level of payments or saw any studies on this subject.

The principal beneficiary of mutual aid in 1970 was Northwest, relatively the most profitable of the parties to the mutual aid agreement. In fact, although it conducted heavily reduced operations during five months of the year because of the strike by BRAC, mutual aid enabled Northwest to attain the highest rate of return on investment of any of the carriers belonging to the agreement.[53] Moreover, with the additional assistance of the income tax laws, Northwest actually enjoyed a greater net income after special items in 1970 than it achieved in 1969. Nor would Northwest have been deprived of a net profit for the year if the 25 percent "standard amount" level had still been in effect. On the other hand, National, the carrier with the worst 1970 rate of return on investment of the pact carriers, a negative figure, and which itself received mutual aid of $27,985,000, 52 percent of which were in "windfall" payments, was required to pay to Northwest, $1,246,000, all of which were "supplemental" payments. Similarly, TWA received $2,452,000 in mutual aid in 1970, 67 percent of which constituted "windfall" amounts. Next to National, it had the worst return on investment, also a negative figure. But it had to pay a total of $8,399,000 to National and Northwest, of which some 85 percent comprised "supplemental" payments. In these circumstances, the contention of the Trunk-

[53] Appendix F.

line Carrier Parties that the carriers were able to make the payments called for by the agreement without impairment of their financial condition is hollow.

A review of mutual aid data over the life of the agreement again shows that the greatest recipients have been among the relatively more profitable members. Thus, the recipient of the largest amount of mutual aid has by far been Northwest, which has had net receipts of $49,871,000.[54] Yet, in eight of the ten years from 1961 through 1970, Northwest had the highest rate of return on investment of any of the present trunkline pact members.[55] National was the next highest recipient of pact aid, a net of $26,185,000. But, over the period 1961 through 1970, it had the highest rate of return on investment in one year, the second highest in four years, and in only two years was not among the top half of the present group of trunkline members of the pact.

On the other hand, the highest contributor under the agreement has been United, with net payments in the amount of $28,223,000. United has been in the top half of the ten present trunkline members of the pact only once in terms of rate of return on investment during the ten-year period reviewed. That was in 1969 when the carrier reached fifth place. The carrier's rate of return on investment over this period did not exceed 9.82 percent and was as low as 0.59 percent.[56] Other evidence of the adverse effect on

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[54] Appendix G.

[55] Appendix F.

[56] In General Passenger-Fare Investigation, 32 C.A.B. 291, 308-309 (1960), the Board found reasonable an overall rate of return on investment of 10.25 percent for the Big Four carriers. Recently, in Domestic Passenger-Fare Investigation, Phase 8—Rate of Return, Order 71-4-58, April 9, 1971, Opinion, p. 32, reconsideration denied, Order 71-7-43, July 8, 1971, the Board found the reasonable rate of return for domestic trunkline passenger services to be 12 percent.

United of mutual aid is reflected in the carrier's working capital. As of December 31, 1968, United's working capital amounted to $45,994,000. At December 31, 1970, the carrier's working capital totaled $17,520,000. The carrier estimated that if there were no mutual aid agreement its working capital would have been $47,225,000 at December 31, 1970. The next highest payer of mutual aid has been Pan American, in the net amount of $21,846,000. Pan American has been in the top half of the pact members, in terms of rate of return on investment, four times in the ten-year period, but since 1963, it has reached the top half only once, fifth place in 1967. The carrier had a negative rate of return on investment in 1969 and a return of only 0.51 percent in 1970.[57]

The defect in the mutual aid agreement of ignoring the financial conditions of the contributing carriers has been intensified by the increased emphasis on "supplemental" payments. Clearly, broadening the pact membership has not overcome the problem. It is significant that of the $187,485,000 changing hands under the agreement since its inception and through June 1971, 45 percent is attributable to the four strikes since the October 1969 amendments. The extraordinary shift in balance toward "supplemental" payments was pointed out earlier. In fact, 27 percent of the total of mutual aid payments since the beginning of the pact is reflected in the $49,688,000 in "supplemental" payments made in connection with these four strikes. Whatever equity there may be in competing varriers surrendering the profits from additional gains because of a strike on a brother airline does not extend to "supplemental" pay-

[57] Nevertheless, in the latter year, Pan American paid out $9,404,000 under the mutual aid agreement, 76 percent of which was in "supplemental" payments.

ments which are imposed regardless of the competitive relationship between the struck carrier and the other members of the agreement.

With respect to the hardship on contributing carriers of the obligations of the mutual aid agreement, it is pertinent that the one percent limitation is not a true ceiling on payments because of the "windfall" payments. For example, while the $5,894,000 in "supplemental" payments made by Eastern in 1970 are clearly within the one percent standard, counting "windfall" payments, the carrier paid out $19,319,000, or somewhat in excess of two percent of its 1969 air transport operating revenue.[58] Moreover, since the one percent limitation was not reached in 1970, if the strike situation should become worse, the impact on the contributing carriers would be even greater.

The record does not establish that any carrier has incurred or prolonged a strike because of the increased level of mutual aid. Nor does it demonstrate that the viability of any carrier has been critically threatened because of the higher level of contributions required under the amended agreement. But the dangers are apparent and outweigh the benefits that may be obtained by struck carriers from the additional financial support afforded by the augmented level of mutual aid.[59]

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[58] Appendix H. The total payments of Continental, United, and Western also exceeded one percent of the individual carrier's 1969 adjusted transport operating revenue. It might further be noted that Western's membership in the agreement did not become effective until August 3, 1970, so that the carrier made no payments to National and no payments for the first 25 days of the BRAC strike against Northwest.

[59] Also weighing against a current need for increased mutual aid as a tool for persuading the unions to temper their requests is the fact that wage-price guidelines are currently in effect and increases in wages and prices are subject to Governmental approval.

Local Service Carrier Amendments

Once before the Board entertained the question of whether the local service carriers should be permitted to participate in mutual aid. The Board disapproved the mutual aid agreement as adverse to the public interest because it found there was a substantial prospect that the local service carrier's subsidy requirement would be increased through its participation in the agreement.[60] The Board stated that its findings and conclusions were without prejudice to the submission of a revised agreement containing provisions assuring against any possible subsidy burden on the local service carrier.

The Local Service Carrier Parties claim the condition which the Board laid down in the *American-Mohawk* case is met under present circumstances. Thus, under the most recently effective class rate formula[61] a local service carrier's subsidy would be unaffected by either mutual aid payments or mutual aid receipts. In addition, it is contended that local service carriers stand to gain considerably more in the way of financial benefits under the agreement than they would be called upon to pay out because of the operation of the "windfall" provisions of the agreement.

It is true that under the most recent versions of the class rate formula, so long as a local service carrier remains on a closed rate, its subsidy is untouched by mutual aid receipts or payments. Nevertheless, adherence to the mutual aid agreement hardly seems consistent with the statutory scheme particularly as reflected in section 406 of the Act.

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[60] Mutual Aid Agreement between American Airlines, Inc., and Mohawk Airlines, Inc., Order E-24213, September 23, 1966.

[61] Investigation of the Local Service Class Subsidy Rate, Order 71-3-7, March 1, 1971.

For example, as in the case of Mohawk, the class rate formula provides no funds for a carrier which does not operate, even if the suspension of operations is caused by a strike. If some service were conducted, subsidy would be available to sustain the operations which were performed. Yet, under the mutual aid agreement, payments are made for operations which are shut down and not entitled to subsidy support. Thus, the other local service carrier parties to the agreement made payments to Mohawk from their working capital, which included subsidy receipts, although under the class rate formula that carrier was not authorized direct subsidy from the Government. If a trunkline carrier were on strike, while none of those carriers presently receive subsidy, through the payments of the Local Service Carrier Parties the trunkline carriers would be securing a measure of subsidy help.

If a local service carrier should be on an open rate when it suffers a strike, it has recourse to the subsidy provisions of the Act.[62] The Board must determine the carrier's need in light of the developmental purposes of the Act under the statutory standards of honest, economical, and efficient management.[63] To the extent the criteria are met, strike losses are underwritten.[64] Therefore, mutual aid would be unnecessary. With regard to strike losses which the Board finds are not allowable under the statutory standards, it would be incongruous for such losses to be alleviated by

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[62] Section 406.

[63] American Overseas Airlines v. Civil Aeronautics Board, 254 F. 2d 744 (D.C. Cir. 1958).

[64] Transatlantic Final Mail Rate Case, Reopened, 42 C.A.B. 195 (1965), *affd., sub nom.*, Trans World Airlines v. Civil Aeronautics Board, 385 F. 2d 648 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 944 (1968).

other, subsidized carriers.[65] Accordingly, from a conceptual viewpoint, the extent of the exposure of the local service carriers under the agreement is immaterial.

Nevertheless, the Local Service Carrier Parties argue that the cost of belonging to the pact is reasonable. They contend that the maximum amount payable in one year would range among the participating local service carriers from about $500,000 to around $750,000.[66] As previously indicated, such a contention does not take into account the effect of "windfall" payments. Moreover, this contention overlooks the impact on individual carriers. As an example, the local service carrier party to the agreement subject to the maximum exposure is Frontier, a carrier which has never undergone a strike. The exposure of about $750,000 is significantly greater than the carrier's operating profits in 1969 and 1970.[67] The Board has lately permitted Frontier to suspend service over major routes because among other things, the carrier's financial condition is "so serious."[68] Adherence to the pact, therefore, reflects not only a substantial gamble on Frontier's part but also, if the Board

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[65] In the one case directly dealing with the matter, the Board disallowed payments made under the mutual aid agreement by a subsidized carrier in determining that carrier's mail pay need. Pan American Mail-Rate Case, Reopened, 35 C.A.B. 540, 555 (1962).

[66] These amounts would be reduced in half under the provisions of the agreement in effect prior to October 31, 1969.

[67] In 1969 and 1970, Frontier had operating profits of $479,000 and $415,000, respectively, and in 1968 it suffered an operating loss of $1,921,000.

[68] Frontier Airlines, Inc., Suspension Applications, Order 72-1-100, January 28, 1972, p. 7. This example also mirrors the chief flaw in the agreement, the absence of consideration of the financial conditions of the paying carriers. Frontier paid Mohawk $59,000 in 1971 pursuant to the mutual aid agreement all of which constituted "supplemental" payments. This amount is larger than the payment of any other local service carrier.

were to ratify Frontier's participation, a similar speculation by the Board.

The Local Service Carrier Parties urge, however, that as a group they stand to gain much more in the way of benefits than they may assume in obligations. If the Mohawk situation should be representative, this claim is valid. Of the $5,861,000 in mutual aid received by Mohawk, $5,626,000, or 96 percent, was paid by the trunkline carrier members of the agreement. Moreover, the trunkline carriers supplied the entire amount of the "windfall" payments, $414,000, and 96 percent of the "supplemental" payments.

The financial results of the trunkline carriers in the last several years indicate that they can ill-afford such a drain on their resources.[69] Thus, the very argument of the Local Service Carrier Parties that their strike losses would be borne largely by the nonsubsidized trunkline carriers weighs against sanctioning local service carrier membership in the mutual aid agreement.

The Local Service Carrier Parties claim that their vulnerability to strikes has resulted in increasingly costly wage settlements in recent years. They point to evidence that the average annual salary on local service carriers rose 54 percent from 1965 to 1970 compared with 48 percent on the trunkline carriers. They also note evidence indicating that settlements on local service carriers since

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[69] The rate of return on investment of the Trunkline Carrier Parties for the period 1967 through 1970 was as follows:

Year	*Rate of Return*
1967	8.0%
1968	5.4
1969	4.2
1970	1.5

Source: Trunkline Carrier Exhibit No. 36.

October 1968 have resulted in an average increase in annual continuing costs of 12.2 percent as compared with 10.7 percent on trunkline carriers. [70] The Local Service Carrier Parties conclude from these data that the unions have been more successful in pressing inflationary demands upon the local service industry than upon the trunkline industry and attribute the reason to knowledge on the part of the unions that local service carriers cannot afford to take strikes.

These contentions are unpersuasive. Since 1965 the equipment of the local service carriers in the small jet category has become comparable to that of the trunkline carriers to a large degree. Moreover, the local service carriers have extended their operations considerably and are operating comparable service over route segments formerly reserved for trunkline carriers. These factors explain in large part the narrowing of the salary gap between the local service and trunkline carriers. In addition, Mohawk's actions exemplify the fact that the local service carriers have not surrendered to a strike threat when they believed suffering a strike was justified.

The record does not display an urgent need on the part of local service carriers to join the mutual aid agreement. Nor does it reveal that local service carriers are especially inviting targets for union attempts to establish new industry precedents. Rather, it shows that mutual aid is not sufficient to overcome the difficulties of a carrier with deep-seated financial inadequacies and that, where a carrier is more firmly braced, the carrier can rebound

[70] The record shows that, as of December 31, 1971, local service carriers having contracts with IAM were paying hourly rates in many classifications equaling or exceeding the rates paid by the trunkline carriers.

successfully from the adverse effects of a strike without mutual aid.[71]

The trauma of Mohawk[72] demonstrates that the heavy financial advantages of mutual aid to a struck carrier are insufficient to avoid the consequences of the lack of adequate financial underpinning. Even with mutual aid, the carrier has resorted to the merger path to resolve its problems.

On the other hand, while a 30-day strike on Piedmont in 1969 took a heavy toll of the carrier, it bounced back strongly. The carrier estimates that it suffered an operating loss for the period of the strike in the amount of $1,750,557. The operating loss for the year was $161,341. But the carrier achieved an operating profit of $1,682,921 in 1970, more than twice the 1968 operating profit of $740,207. Instead of the union attempting to establish an industry-wide precedent through a local service carrier, this situation involved an attempt to enforce on a local service carrier an arbitration decision applicable to a trunkline carrier (United) requiring the use of three-man crews on the Boeing 737.[73]

Ozark overcame the adverse effects of a strike even more successfully. Ozark was struck for five days in 1970. The carrier estimates it lost (during and post-strike) $838,085 as a result of the strike. Nevertheless, it enjoyed an operating profit of $1,531,688 in 1970, a complete reversal of its 1969 picture when it incurred an operating loss of $1,195,493.

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[71] The rate of return on investment element of a carrier's subsidy contains recognition for the risk of strike losses. Transatlantic Final Mail Rate Case, Reopened, 42 C.A.B. at 213.

[72] And of Capital.

[73] The experience of Air West denotes that membership in the pact does not safeguard a local service carrier against strikes.

In light of the foregoing, approval of local service carrier participation in the mutual aid agreement is not consistent with the public interest.

Disapproval Should Operate Prospectively

Section 4 of the mutual aid agreement provides, in part:[74]

> This Agreement shall become effective as of October 31, 1969, and shall be filed with the CAB. If this Agreement shall be disapproved by the CAB, it shall terminate forthwith to the extent disapproved, and payments made hereunder, to the extent they are affected by the terms of such disapproval, shall become and be treated as obligations owing from the receiving party to the paying party.

Section 3 of the local service carrier amendments reads similarly.[75]

In light of the decision herein, if the provisions of the agreement were permitted to take effect, all payments which exceed the 25 percent "standard amount" provision, as the agreement read prior to October 31, 1969, would have to be returned. National would be required to give back $9,459,000, Northwest to return $15,368,000, and TWA to restore the entire amount of "supplemental" payments, $805,000, to the paying carriers. In addition, Mohawk would have to turn back the complete amount of mutual aid it received, $5,861,000.

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[74] Appendix A, p. 7.

[75] "This Amendment shall be filed with the CAB upon execution. If this Amendment is disapproved by the CAB, in whole or in part, it shall terminate forthwith, and payments made hereunder shall become and be treated as obligations owing from the receiving party to the paying party." *Id.* at 11.

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The Board's order of remand explicitly placed in issue the question of whether disapproval of any of the amendments should operate prospectively only. The Six Union Parties are the only parties to address that issue directly. They contend that disapproval should be applied retroactively on the ground that there is no sound reason why a carrier should be rewarded for having engaged in conduct adverse to the public interest and the industry while it seeks approval of its agreement. The Six Union Parties maintain that prospective disapproval simply encourages irresponsibility in this area. The Bureau urges that, apart from the general question of local service carrier participation, Mohawk's receipt of pact benefits should not be disapproved for a strike in progress at the time the carrier entered the agreement.[76]

The Examiner is convinced that, to the extent the amendments of the mutual aid agreement are rejected herein, the disapproval should function prospectively. It cannot be overlooked that the Board initially approved the October 1969 amendments, and even when it decided to remand the proceeding for a further evidentiary hearing declared, "We are not presently persuaded that our earlier determination was in error."[77] Moreover, implementation of the amended agreement pending decision was fully lawful.[78] In these circumstances, it would require compelling circumstances to justify applying this decision retroactively.

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[76] ALPA states that it recognizes disapproval of the amendments does not necessarily require return of the amounts paid and received, but it does not set forth a position on this question.

[77] Order 70-11-110 at 2.

[78] Airlines Mutual Aid Pact, Order 71-3-183, March 30, 1971.

Of course, as has been indicated, the amended agreement itself renders the receiving carriers liable to the extent the agreement is disapproved. But the effectuation of these provisions would be a disservice to the public interest. Some of the payments were made as long as two years ago with apparent anticipation by both paying and receiving carriers that the amended agreement would be approved. Both paying and receiving carriers conducted their operations and drew their financial plans on that basis. To enforce a pay back at this point in time could cause substantial detriment to the recipients of mutual aid. Moreover, in the final analysis, there is no showing that requiring a reversion of mutual aid receipts made excessive or disapproved by this decision would advance any statutory objective.

No sound reason appears to uphold the Six Union Parties' contention that disapproval prospectively would promote irresponsibility. Certainly the impact of prospective disapproval on the carriers making the mutual aid payments should discourage carriers in the future from indiscreet action in relation to agreements pending Board approval under section 412.

Mutual Aid Agreement Approved if Modified

The mutual aid agreement stands before the Board as amended October 31, 1969, and December 10, 1970. As has been discussed heretofore, the increases in the "standard amount" and concomitant potential liability of the paying carriers and the admission of the local service carriers are inconsistent with the objectives of the Act. If the agreement were modified to conform with the instant decision, it would be substantially in the form approved by the Board

for an indefinite period.[79] Accordingly, the mutual aid agreement shall be approved subject to the conditions previously imposed by the Board[80] and to modification of the agreement by the parties thereto in accordance with the requirements of this decision.

Ultimate Findings

On the basis of the foregoing facts and considerations and all of the evidence of record,[81] it is found that the mutual aid argeement is not adverse to the public interest or in violation of the Federal Aviation Act of 1958, as amended, and should be approved, subject to the following conditions:

1. The agreement shall be modified so that:

a. In section 1(B)(1), the "standard amount" shall not exceed 25 percent;

b. In section 1(B)(2), the obligation of any party to the agreement to make additional payments shall not exceed one-half of one percent of its air transport operating revenue for the prior calendar year;

c. In section 4, no carrier receiving mutual aid subsequent to October 31, 1969, and prior to the effective date of this decision as the decision of the Board shall be obligated to repay amounts received in excess of the amounts

[79] Order 70-7-114, reconsideration denied in part, Order 70-11-110. The ingress and egress features and the arbitration provisions of the agreement would be different. But these changes have not been directly litigated and are not adverse to the public interest or in violation of the Act.

[80] Order 70-7-114.

[81] Contentions of the parties not discussed herein have been considered by the Examiner and do not alter the decision.

receivable pursuant to the modifications prescribed herein; and

d. The December 10, 1970, amendment shall be eliminated, provided that no carrier receiving mutual aid pursuant to such amendment prior to the effective date of this decision as the decision of the Board shall be obligated to repay such receipts;

2. Not later than ten days after the effective date of this decision as the decision of the Board, there shall be filed with the Board amendments to the agreement in conformance with the moifications mandated in paragraph 1. above;

3. The approval shall not be deemed a determination of the reasonableness of the financial provisions of the agreement for future ratemaking or other regulatory provisions under the Act;

4. The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

5. In accounting for the amounts due to others and the amounts due from others under the agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by Part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the agreement as may be reasonably required by the Director of the Board's Bureau of Operating Rights; and

6. Copies of all arbitrator's decisions and awards issued under this agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

It is further found that the motion of the Local Service Carrier Parties to strike portions of the joint brief of APA and AMFA should be granted.

An appropriate order is attached.

Appendix A

MUTUAL AID AGREEMENT

(As Amended to October 31, 1969)

WITNESSETH:

WHEREAS, the parties are common carriers holding certificates of public convenience and necessity issued by the Civil Aeronautics Board (hereinafter called CAB) providing for the transportation by air of persons, property and mail; and

WHEREAS, the mutual interests of the parties call for the taking of all proper and lawful measures to bring about sound and reasonable economic conditions that will be of benefit to the air transport industry and to the public; and

WHEREAS, the parties and other airlines are facing or faced with the threat of extreme and unreasonable demands made by representatives of certain of the classes and crafts of their employees, as exemplified by the current dispute between certain of the parties and their maintenance and related employees, represented for the purpose of collective bargaining by the International Association of Machinists, AFL/CIO (hereinafter called IAM), a controversy in which IAM has rejected and shown an utter disregard for the recommendations of the Emergency Board 122 appointed by the President of the United States to investigate said dispute and has struck Capital Airlines and threatened to strike other carriers for their insistence upon substantial compliance with the terms of said recommendations, which action of the IAM tends to undermine the influence, posi-

tion and integrity of such Board and is destructive of the collective bargaining process; and

WHEREAS, it is in the public interest and the interest of the parties hereto that the recommendations of such Presidential Emergency Board created under the provisions of the Railway Labor Act be respected by the employers and employees whose dispute was heard by the Board;

NOW, THEREFORE, the parties hereby agree:

1. (A) In the event any party suffers a strike, resulting in the shutdown of its flight operations, (i) which has been called for reasons which include the enforcement of demands in excess of or opposed to the recommendations of a board established by the President of the United States under section 10 of the Railway Labor Act and applicable to such party; or (ii) which has been called in the absence of the establishment of such a board or in case of the failure of such a board to make specific recommendations on the merits for the settlement of the issues in dispute, and the struck party has in all respects acted in compliance with the Railway Labor Act; or (iii) which has been called before the employees on strike shall have exhausted the procedures of the Railway Labor Act; or (iv) which is otherwise unlawful; then, in such event, each party will pay over to the party suffering the strike an amount equal to its increased revenues attributable to the strike during the term thereof, less applicable added direct expenses.

[* (B) In the event payments to a struck party under

* Brackets denote changes to the Agreement effective October 31, 1969. Portions which were substantially revised in October of 1969 are entirely encompassed within brackets. Where revisions took the form of additions of phrases or sentences, only the new language is bracketed.

(A) shall be less than the standard amount, as defined below, the other parties (whether or not they are obligated to make payments under (A)) shall make such additional payments to the struck party as may be necessary to bring the aggregate of the payments under (A) and (B) up to the standard amount, in accordance with and subject to the following provisions:

(1) The standard amount is equal to the percentages specified below of the struck party's normal air transport operating expenses for the flight operations shut down as a result of the strike:

(a) During the first fourteen days following commencement of the strike, fifty percent of such expenses;

(b) During the next seven days, forty-five percent of such expenses;

(c) During the next seven days, forty percent of such expenses;

(d) During any subsequent period of the strike, thirty-five percent of such expenses.]

(2) The additional payments required of each party under [(B)] shall be in the proportion that such party's air transport operating revenue for the calendar year next prior to the year in which the strike occurs bears to the total of such revenue for all paying carriers, but no party shall be obligated to make additional payments with respect to any calendar year which exceed, in the aggregate, [one percent of such party's air transport operating revenue for such prior calendar year, except that the parties may agree at any time in writing that the liability for additional payments in a particular calendar year shall be subject to

a higher percentage limitation, in which event any carrier that thereafter joins this Agreement shall be subject to such agreement to increase liability in the calendar year in which its adherence becomes effective.]

(3) In any calendar year in which there are two or more struck parties entitled to payments under (B) and the limitation contained in paragraph (2) shall prevent any of such struck parties from receiving the standard amount, the aggregate amount of all additional payments for such year under (B) shall be redistributed between the struck parties on the basis described below. There shall be no redistribution of payments under (A).

The redistribution of additional payments under (B) shall be with the object that, to the extent possible, no one of the struck parties shall receive from the total of payments under (A) and (B) a lower percentage of the standard amount than is received by any of the other struck parties except when a lower percentage of the standard amount results from the principle that there will be no redistribution of payments under (A).

An example of redistribution of payments under (B) is set forth in Appendix I attached hereto.

(4) The redistribution referred to in paragraph (3) shall be made promptly from time to time whenever it appears that a party which has already received payments under (B) will attain a higher percentage of the standard amount than it will be entitled to thereunder.

(C) All strike payments shall be made monthly within ten days after the close of each calendar month, or at such more frequent intervals as may be agreed to by the parties, upon the basis of preliminary estimates subject to subsequent adjustment.

(D) For the purposes of the Agreement:

(1) A struck party's normal air transport operating expenses for each day for any operation shall be its average daily air transport operating expenses for such operation includable in Accounts 5100-7000 under the CAB's Uniform System of Accounts and Reports for twelve months of full operations immediately preceding the month in which the strike shall have started, excluding added direct expenses applicable to increased revenues attributable to a strike as described in (A) above. A month in which a party's normal operations have for any reason been curtailed to an extent that substantially affects its air transport operating expenses shall not be regarded as a month of full operations.

(2) A party's air transport operating revenue shall include all payments such party has received under the Agreement, but shall not include the increased revenues attributable to any strike with respect to which such party shall have made payments under the Agreement.

(E) In the event of a dispute regarding the requirement to make or the right to receive payment, [or the amount of any payment], the dispute shall be referred to final and binding arbitration [at the instance of any party to the Agreement]. Unless the parties [to the Agreement have previously agreed otherwise, or the parties] involved [in the dispute] otherwise agree within twenty days after receipt of the notice and demand for arbitration, the arbitrator[s] shall be selected and the arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Judgment upon any award rendered hereunder may be entered in any court having jurisdiction.

Opinion

[2. This Agreement shall be open to any trunk air carrier holding a certificate of public convenience and necessity issued by the CAB subject to the following adherence conditions:

(A) Any such trunk carrier may become a party to the Agreement by forwarding signed counterpart copies to each of the other parties and to the CAB for filing by November 15, 1969, such adherence to the Agreement to become effective on the midnight following the execution of the counterpart copies.

(B) Any such trunk carrier that does not adhere to the Agreement by November 15, 1969, may subsequently become a party by forwarding signed counterpart copies to each of the other parties and to the CAB, such adherence to become effective at the expiration of six months from the date of forwarding of said counterpart copies. No payments will be due to or from such joining carrier during said six-month period except as required by (C) below.

(C) Whenever a carrier that was once a party to the Agreement re-enters the Agreement after November 15, 1969, it shall, in addition to giving the notice specified in (B), be liable to pay an amount equal to all payments it would have had to make less all payments it would have been entitled to receive during the period following its last withdrawal from the Agreement, but if it would have been entitled to receive payments in excess of the payments it would have had to make this paragraph shall be inapplicable.

(D) The payment required by (C) shall be made to the parties to the Agreement at the time the re-entry becomes effective as follows:

(1) to be parties suffering strikes covered by this Agreement during the period referred to in (C) to the extent those parties failed to receive payments equal to the standard amount or, if the aggregate amount of these deficiencies exceeds the amount due from the re-entering carrier, then to such parties pro rata in proportion to the deficiencies suffered by each;

(2) if an amount remains after applying (D) (1), then to all parties making payments under Clause 1(B) during the period referred to in (C) to the extent of such parties' paments (without regard to receipts by such parties under Clause 1(B)), or, if the aggregate of these payments by such parties exceeds the amount due from the re-entering carrier, then to such parties pro rata in proportion to such payments;

(3) if an amount remains after applying (D) (2), then to each party making payments under Clause 1(A) during the period referred to in (C) pro rata in proportion to such parties' payments (without regard to receipts by such parties under Clause 1(A)).]

[3. This Agreement shall continue in effect until December 31, 1972, and thereafter from year to year, but any party may withdraw effective as of December 31, 1972, or December 31 of any year thereafter by giving at least one year's written notice to the other parties and the CAB. Upon such notice of withdrawal by any party, any other party may also withdraw effective as of December 31 of the same year by giving at least eleven months' written notice to the other parties and the CAB.]

[4. This Agreement shall become effective as of October 31, 1969, and shall be filed with the CAB.] If this Agree-

ment shall be disapproved by the CAB, it shall terminate forthwith to the extent disapproved, and payments made hereunder, to the extent that they are affected by the terms of such disapproval, shall become and be treated as obligations owing from the receiving party to the paying party.

Any party may withdraw from the Agreement, in the event the CAB disapproves it in whole or in part, by so notifying each of the other parties and the CAB within ten days of such disapproval, [such withdrawal to become effective one year from the date of such disapproval. In the event any party so withdraws, any other party may also withdraw by so notifying each of the other parties and the CAB within twenty days after such disapproval, such withdrawal also to become effective one year from the date of such disapproval.]

IN WITNESS WHEREOF, the parties have signed this Agreement as of the 31st day of October, 1969.

AMERICAN AIRLINES, INC.	NORTHWEST AIRLINES, INC.
By	By .....
BRANIFF AIRWAYS, INC.	PAN AMERICAN WORLD AIRWAYS, INC.
By	By .....
CONTINENTAL AIRLINES, INC	TRANS WORLD AIRLINES, INC.
By	By .....
EASTERN AIR LINES, INC.	UNITED AIR LINES, INC.
By	By .....
NATIONAL AIRLINES, INC.	
By	

Amendment to Mutual Aid Agreement (December 10, 1970)

WITNESSETH:

WHEREAS:

A. The undersigned are parties to an agreement known as the "Mutual Aid Agreement" (hereafter referred to as "the Agreement"), which has been amended from time to time, most recently as of October 31, 1969.

B. The undersigned parties desire to amend the Agreement to permit entry into it of members of that class of air carriers, holding certificates of public convenience and necessity issued by the Civil Aeronautics Board (hereafter called CAB), known as local service carriers.

NOW, THEREFORE, the undersigned hereby agree:

1. Notwithstanding the provisions of paragraph 2 of the Agreement,

(a) any local service carrier holding a certificate of public convenience and necessity issued by the CAB may become a party to the Agreement by forwarding signed counterpart copies of the Agreement and of this Amendment to each of the other parties to the Agreement, to every other such local service carrier, and to the CAB for filing by December 29, 1970;

(b) such adherence to the Agreement shall become effective as of 0001 hours January 1, 1971;

(c) any such local service carrier not adhering to the Agreement in the manner provided in subparagraph (a), above, may do so in the manner described in paragraph 2(B) of the Agreement, provided that it also sign and forward to each of the other parties, to every other local service carrier, and to the CAB a counterpart copy of this Amendment.

2. Subject to paragraph 1(b), above, the provisions of the Agreement, including paragraph 2, shall be fully applicable to any local service carrier once it becomes a party to the Agreement.

3. This Amendment shall be filed with the CAB upon execution. If this Amendment is disapproved by the CAB, in whole or in part, it shall terminate forthwith, and payments made hereunder shall become and be treated as obligations owing from the receiving party to the paying party.

4. In the event the CAB disapproves this Amendment, the Agreement shall remain in full force and effect as if this Amendment had not been executed.

IN WITNESS WHEREOF, the parties have signed this Amendment as of this 10th day of December, 1970.

American Airlines, Inc.	Northwest Airlines, Inc.
By	By .....
Braniff Airways, Inc.	Pan American World Airways, Inc.
By	By .....
Continental Airlines, Inc.	Trans World Airlines, Inc.
By	By .....
Eastern Airlines, Inc.	United Airlines, Inc.
By	By .....
National Airlines, Inc.	Western Airlines, Inc.
By	By .....

1972 INITIAL DECISION, APPENDIX B

MUTUAL AID PAYMENTS AND RECEIPTS

1958-1961

($000)

Carrier	Received	Paid	Net Total
American	$ 4,431	$ 2,122	$ 2,309
Braniff	—	268	(268)
Capital	2,619	2,085	534
Continental	—	87	(87)
Eastern	2,209	490	1,719
National	108	411	(303)
Northwest	3,601	116	3,485
Pan American	121	1,297	(1,176)
TWA	3,071	1,905	1,166
United	—	7,378	(7,378)
Total	$16,160*	$16,159*	—

Source: Carrier Exhibit No. 4, p. 1, received in evidence at October 1968 hearing.

*Columns do not total the same because of rounding of figures process in original exhibit. Braniff received payment of less than $500.

1972 INITIAL DECISION, APPENDIX C

STRIKES IN THE AIRLINE INDUSTRY 1968-71*

No. Line	Carrier (1)	Date Work Stoppage Began (2)	Ended** (3)	Duration (Days) (4)	Union (5)
1	Standard Airways	8/31/68	10/15/68	46	SAFEA
2	Reeve Aleutian Airlines	10/19/68	1/2/69	76	IAM
3	National	1/17/69	1/21/69***	4	IAM Mechanics
4	American	2/27/69	3/19/69	21	TWU Mechanics
5	Air Canada	4/21/69	5/20/69	30	IAM
6	Northwest	6/13/69	6/13/69	5 hrs.	ALPA
7	Piedmont	7/21/69	8/20/69	30	ALPA
8	Western	7/29/69	8/16/69	19	IBT Mechanics
9	Pan American	8/9/69	8/12/69	4	IBT
10	Los Angeles Airways	10/20/69	4/24/70	187	ALPA
11	National	1/31/70	5/27/70	116	ALEA
12	Ozark	4/19/70	4/24/70	5	Aircraft Mechanics
13	World Airways	5/15/70	7/4/70	51	IBT
14	Northwest	7/8/70	12/14/70	160	BRAC
15	Trans World	10/19/70	10/21/70	2	ALSSA-TWU
16	Mohawk	11/12/70	4/14/71	154	ALPA
17	Air Canada	7/12/71	7/13/71	1	IAM

* This represents only those strikes known to the trunkline carrier parties and does not purport to be an exhaustive list of all strikes during the period. Strikes were listed whether or not an interruption of service resulted.

** Indicates date on which at least partial operations were resumed. In some cases full operations were not resumed for some time thereafter.

*** Wildcat strike.

Source: Trunkline Carrier Exhibit No 4.

MUTUAL AID PAYMENTS AND RECEIPTS

1962-1969

($000)

Carrier	Received			Paid			Net Total		
	Wind.	Supp.	Total	Wind.	Supp.	Total	Wind.	Supp.	Total
American	$ 20,311	$ —	$ 20,311	$ 26,806	$ 5,527	$ 32,333	($ 6,495)	($ 5,527)	($12,022)
Braniff	—	—	—	1,881	1,176	3,057	(1,881)	(1,176)	(3,057)
Continental	—	—	—	3,440	930	4,370	(3,440)	(930)	(4,370)
Eastern	7,375	16,308	23,683	1,299	284	1,583	6,076	16,024	22,100
Northwest	1,258	1,234	2,492	1,415	701	2,116	(157)	533	376
Pan American	3,484	1,784	5,268	10,129	5,586	15,715	(6,645)	(3,802)	(10,447)
TWA	17,962	—	17,962	9,453	2,173	11,626	8,509	(2,173)	6,336
United	18,024	—	18,024	13,991	2,949	16,940	4,033	(2,949)	1,084
Total	$ 68,414	$19,326	$ 87,740	$ 68,414	$19,326	$ 87,740	$ —	$ —	$ —

Sources: Carrier Exhibit No. 4, p. 1, received in evidence at October 1968 hearing and Trunkline Carrier Exhibit No. 6, p. 2, revised.

MUTUAL AID PAYMENTS AND RECEIPTS
1970-June 1971
($000)

Carrier	Received			Paid			Net Total		
	Wind.	Supp.	Total	Wind.	Supp.	Total	Wind.	Supp.	Total
American	$ —	$ —	$ —	$ 3,136	$ 7,880	$ 11,016	($ 3,136)	($ 7,880)	($11,016)
Braniff	—	—	—	175	2,407	2,582	(175)	(2,407)	(2,582)
Continental	—	—	—	1,047	1,913	2,960	(1,047)	(1,913)	(2,960)
Eastern	—	—	—	13,440	6,571	20,011	(13,440)	(6,571)	(20,011)
National	14,641	13,344	27,985	—	1,497	1,497	14,641	11,847	26,488
Northwest	17,195	30,092	47,287	7	1,270	1,277	17,188	28,822	46,010
Pan American	—	—	—	2,286	7,937	10,223	(2,286)	(7,937)	(10,223)
TWA	1,647	805	2,452	1,310	7,962	9,272	337	(7,157)	(6,820)
United	—	—	—	10,967	10,961	21,928	(10,967)	(10,961)	(21,928)
Western	—	—	—	1,529	1,055	2,584	(1,529)	(1,055)	(2,584)
Air West	—	—	—	—	50	50	—	(50)	(50)
Frontier	—	—	—	—	59	59	—	(59)	(59)
Mohawk	414	5,447	5,861	—	—	—	414	5,447	5,861
North Central	—	—	—	—	43	43	—	(43)	(43)
Ozark	—	—	—	—	42	42	—	(42)	(42)
Piedmont	—	—	—	—	41	41	—	(41)	(41)
Total	$ 33,897	$49,688	$ 83,585	$ 33,897	$49,688	$ 83,585	$ —	$ —	$ —

Sources: Trunkline Carrier Exhibit No. 6, p. 2, revised, Exhibit FL-7, Exhibit RW-7, Exhibit NCA-7, Exhibit OZA-7, and Exhibit PI-7.

RATE OF RETURN ON INVESTMENT
EXCLUDING INVESTMENT TAX CREDITS 1961-1970

	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970
American	4.23%	5.44%	7.03%	8.90%	9.79%	10.04%	7.23%	7.63%	6.75%	0.07%
Braniff	4.33	5.26	3.69	9.22	12.53	13.99	5.84	7.83	6.66	3.11
Continental	5.34	6.31	7.86	11.37	19.10	20.87	13.58	5.72	4.73	5.42
Eastern	(1.14)	(2.01)	(12.15)	1.81	13.35	7.30	8.22	1.99	3.67	1.90
National	(0.47)	13.53	8.66	15.02	19.57	15.87	17.06	12.76	9.12	(1.81)
Northwest	5.87	8.04	10.72	18.82	26.20	21.88	19.13	14.2	10.1	6.5
Pan American	4.93	6.84	11.58	9.66	11.58	13.78	8.81	5.67	(0.85)	0.51
TWA	(6.14)	3.36	10.88	12.98	13.17	9.03	6.48	4.59	5.09	(0.95)
United	3.11	4.18	5.28	7.00	9.82	7.73	8.25	6.04	6.04	0.59
Western	3.97	10.17	14.85	18.35	15.59	16.06	10.91	6.66	0.51	5.22

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	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970
American	5	6	7	8	10	7	8	4	3	8
Braniff	4	7	9	7	7	5	10	3	4	5
Continental	2	5	6	5	3	2	3	7	7	2
Eastern	9	10	10	10	5	10	7	10	8	4
National	8	1	5	3	2	4	2	2	2	10
Northwest	1	3	4	1	1	1	1	1	1	1
Pan American	3	4	2	6	8	6	5	8	10	7
TWA	10	9	3	4	6	8	9	9	6	9
United	7	8	8	9	9	9	6	6	5	6
Western	6	2	1	2	4	3	4	5	9	3

Note: The Examiner does not know whether all of the 1968-1970 data exclude investment tax credits.

Sources: 1961-1964, Handbook of Airline Statistics, Civil Aeronautics Board

1968-1970, Trunkline Carrier Exhibit No. 2.

MUTUAL AID RECEIPTS AND PAYMENTS
OCTOBER 1958-JUNE 1971
($000)

Carrier	Received			Paid			Net Total		
	Wind.	Supp.	Total	Wind.	Supp.	Total	Wind.	Supp.	Total
American	$ 24,742	$ —	$ 24,742	$ 32,064	$13,407	$ 45,471	($ 7,322)	($13,407)	($20,729)
Braniff	—	—	—	2,324	3,583	5,907	(2,324)	(3,583)	(5,907)
Capital	2,619	—	2,619	2,085	—	2,085	534	—	534
Continental	—	—	—	4,574	2,842	7,416	(4,574)	(2,842)	(7,416)
Eastern	9,584	16,308	25,892	15,229	6,855	22,084	(5,645)	9,453	3,808
National	14,749	13,344	28,093	411	1,497	1,908	14,338	11,847	26,185
Northwest	22,054	31,326	53,380	1,538	1,971	3,509	20,516	29,355	49,871
Pan American	3,605	1,784	5,389	13,712	13,523	27,235	(10,107)	(11,739)	(21,846)
TWA	22,680	805	23,485	12,668	10,136	22,804	10,012	(9,331)	681
United	18,024	—	18,024	32,337	13,910	46,247	(14,313)	(13,910)	(28,223)
Western	—	—	—	1,529	1,055	2,584	(1,529)	(1,055)	(2,584)
Total Trunkline	$118,057	$63,567	$181,624	$118,471	$68,779	$187,250	($ 414)	($ 5,212)	($ 5,626)
Air West	$ —	$ —	$ —	$ —	$ 50	$ 50	$ —	($ 50)	($ 50)
Frontier	—	—	—	—	59	59	—	(59)	(59)
Mohawk	414	5,447	5,861	—	—	—	414	5,447	5,861
North Central	—	—	—	—	43	43	—	(43)	(43)
Ozark	—	—	—	—	42	42	—	(42)	(42)
Piedmont	—	—	—	—	41	41	—	(41)	(41)
Total Locals	$ 414	$ 5,447	$ 5,861	$ —	$ 235	$ 235	$ 414	$ 5,212	$ 5,626
Total All Carriers	$118,471	$69,014	$187,485	$118,471	$69,014	$187,485	—	—	—

Sources: Appendices B, D, and E.

1972 INITIAL DECISION, APPENDIX H

TRUNKLINE CARRIER MEMBERS OF AGREEMENT

APPLICATION OF ONE PERCENT LIMITATION ON PAYMENTS

($000)

Carrier	1969 Adjusted Transport Operating Revenue	One Percent of Preceding Column	Total 1970 Net Receipts and Payments
American	$1,031,704	$10,317	($10,163)
Braniff	320,083	3,201	(2,367)
Continental	254,223	2,542	(2,788)
Eastern	860,567	8,606	(19,319)
National	268,054	2,681	26,700
Northwest	465,281	4,653	46,325
Pan American	1,039,304	10,393	(9,404)
TWA	1,072,041	10,720	(5,948)
United	1,456,792	14,568	(20,613)
Western	238,304	2,383	(2,423)
Total	$7,006,353	$70,064	—

Sources: 1969 Adjusted Transport Operating Revenue, Joint Exhibit LSC-8 (Rev.), p. 1.

Total 1970 Net Receipts and Payments, Trunkline Carrier Exhibit No. 6, p. 2 (Revised).

APPENDIX L

Pertinent Sections of:

Railway Labor Act, as amended, 45 U.S.C. § 152, First, Seventh, Ninth;

Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1371, § 1382, § 1384;

Sherman Act, Sec. 1, 15 U.S.C. § 1;

Clayton Act, Sec. 6, 15 U.S.C. § 17

Appendix L

Railway Labor Act, as amended, Section 2, (45 U.S.C. 152):

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act."

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appro-

priate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Section 102, Federal Aviation Act of 1958, as amended, 72 Stat. 740, 49 U.S.C. 1302:

"In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transporta-

tion, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The promotion of safety in air commerce; and

"(f) The promotion, encouragement, and development of civil aeronautics."

Section 401, Federal Aviation Act of 1958, as amended, 72 Stat. 754, as amended by 76 Stat. 143, 49 U.S.C. 1371:

"(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

"(k) (4) It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with sections 181-188 of Title 45."

Section 412, Federal Aviation Act of 1958, as amended, 72 Stat. 770, 49 U.S.C. 1382:

"(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memoran-

dum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

"(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it."

Appendix L

Section 414, Federal Aviation Act of 1958, as amended, 72 Stat. 770, 49 U.S.C. 1384:

> "Any person affected by any order made under sections 408, 409 or 412 of this Act shall be, and is hereby relieved from the operations of the 'antitrust laws', as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

Section 1, Sherman Act, 15 U.S.C. 1:

> "Every contract, combination in the form of trust or otherwise, a conspiracy in restraint of trade or commerce among the several states, is hereby declared to be illegal. * * *"

Section 6, Clayton Act, 15 U.S.C. 17:

> "That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Supreme Court of the United States

JAN 29 1975
MICHAEL RODAK, JR., CLERK

OCTOBER TERM 1974

No. 74-549

ALLIED PILOTS ASSOCIATION, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD and AMERICAN AIRLINES, INC., *et al., Respondents.*

No. 74-709

AIR LINE DISPATCHERS' ASSOCIATION, *et al., Petitioners,*

v.

CIVIL AERONAUTICS BOARD and AMERICAN AIRLINES, INC., *et al., Respondents.*

No. 74-710

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD and AMERICAN AIRLINES, INC., *et al., Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS AMERICAN AIRLINES, INC., ET AL., IN OPPOSITION

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January 1975

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENTS AMERICAN AIRLINES, INC., ET AL., IN OPPOSITION

QUESTION PRESENTED

Whether the Court of Appeals was correct in affirming a Civil Aeronautics Board decision that an agreement among airlines for payments to participants

whose operations were shut down as a result of strikes does not violate the Railway Labor Act and is not adverse to the public interest.

STATEMENT

In 1958 several certificated airlines formed an agreement, thereafter known as the "Mutual Aid" agreement, to afford financial protection to a participating airline whose operations were shut down as a result of a strike. Since its inception over 15 years ago, the agreement has been invoked in a number of strike cases, including some where the struck airline's continued viability was gravely jeopardized by the strike. Although no airline has ever been better off financially as a result of a strike with Mutual Aid payments than it would have been without the strike, Mutual Aid payments have reduced the damage inflicted by strikes on companies in an industry which, because of its heavy passenger service orientation, is highly vulnerable to strike damage.[1]

The Mutual Aid agreement is among those categories of inter-carrier agreements subject to section 412 of the Federal Aviation Act (49 U.S.C. § 1382) requiring that air carrier agreements be submitted to the CAB for approval or disapproval. The Board is required to approve those agreements that it finds do not violate the Federal Aviation Act and are not adverse to the public interest.

The original Mutual Aid agreement was submitted to the CAB in November 1958 and approved for one

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[1] In addition to damage suffered during the pendency of a strike, an airline typically sustains continuing financial losses for a considerable time after the end of a strike, when it is attempting to regain its lost traffic and recover its market position. *See* App. xv-xvi. No Mutual Aid is paid after the strike ends.

year over airline union objections after an extensive oral argument. *Six-Carrier Mutual Aid Pact,* 29 C.A.B. 168 (1959) (App. 5a).[2] This conclusion was affirmed on reconsideration. 30 C.A.B. 90 (1959) (App. 35a). In October 1959 the carriers extended the agreement for an additional period and in March 1960 adopted amendments broadening its coverage, as a result of which four additional carriers joined the agreement.[3] In response to new objections from airline unions, the Board instituted a formal investigation of the agreement and the amendments. 31 C.A.B. 977 (1960) (App. 41a). During the ensuing proceeding the agreement was again amended,[4] and these amendments were included in the investigation. The investigation employed all of the procedures of a formal evidentiary hearing and at its conclusion the Board approved the agreement, as amended, for a three-year period. *Mutual Aid Pact Investigation,* 40 C.A.B. 559 (1964) (App. 44a).

In 1967 the airlines requested that the CAB's approval of the agreement be extended indefinitely. Again, the unions objected and again the CAB set down a formal proceeding in order to have a full record on which to base its decision. (CAB Order E-26,000, Nov. 17, 1967) (App. 134a). This proceeding eventuated in a Board order approving the agreement

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[2] References to "App. —" refer to the Appendix to the petitions in numbers 74-709 and 74-710.

[3] These amendments broadened the categories of strikes covered by the agreement.

[4] The principal change effected by these amendments was to add provisions to assure a specified minimum level of payments to a struck carrier, subject to an annual limit on each paying carrier's liability.

in 1970 for an indefinite period. *Airlines Mutual Aid Pact*, Order 70-7-114, July 23, 1970 (App. 142a). The agreement had been amended again in late 1969.[5] The 1970 approval order also approved these amendments, but in response to a union petition for reconsideration the Board reopened the proceeding for further hearings on the new amendments. (App. 221a). This last proceeding led to the Board's order of 1973 approving the agreement including the latest amendments for five years. *Airlines Mutual Aid Agreement*, Order 73-2-110, Feb. 27, 1973 (App. 225a). In late 1970 the agreement had been again changed to broaden the class of carriers eligible for membership.[6] This change was also included in the subsequent proceeding and was encompassed within the 1973 approval order.

Airline unions, although not generally subject to the jurisdiction of the CAB and without any regulatory agency impediments to their use of economic power in collective bargaining, have participated in all of the CAB proceedings on the Mutual Aid agreement and have consistently opposed approval.[7] Several of these unions sought review of the 1970 and 1973 orders of the CAB. The Court of Appeals, consisting of Chief Judge Bazelon and Judges MacKinnon and Christen-

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[5] These amendments increased the minimum level of payments assured to a struck carrier, increased the limit on each carrier's annual liability for payments, and revised the provisions on joining and withdrawing from the agreement.

[6] The agreement had been confined to certificated trunkline carriers. The 1970 amendment opened the agreement to certificated local service carriers.

[7] There is no statutory requirement of a hearing prior to approval under section 412 of the Federal Aviation Act; the oral argument in 1959 and three subsequent evidentiary hearings were held at the behest of the airline labor unions.

sen, affirmed the Board in all respects. Chief Judge Bazelon's opinion for the unanimous court recognized that the Board's task involved labor relations as well as transportation considerations, and that its judgment had to be consistent with the national labor policy, which contemplates the resort by employers and unions to self-help if established procedures for resolution of disputes have been exhausted without settlements. The Court held that the Board had properly assessed the national labor policy and correctly applied it to approve the Mutual Aid agreement. (App. viii-x). It also upheld the Board's conclusion that the agreement did not violate the Railway Labor Act,[8] relying on a like holding by the Second Circuit Court of Appeals involving a similar strike payments arrangement in the railroad industry. *Kennedy* v. *Long Island R.R.*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963) (App. ix-x).

On the public interest issue, the Court noted that the Board had considered the impact of the agreement on employee welfare in three separate evidentiary proceedings. Although the Board advanced several grounds for finding the agreement consistent with the public interest from the standpoint of employee welfare, Judge Bazelon's opinion found sufficient to sus-

[8] Section 412 of the Federal Aviation Act (49 U.S.C. § 1382) requires for approval of an agreement that the Board find no violation of the Federal Aviation Act. Because section 401(k)(4) of the Act (49 U.S.C. § 1371(k)(4) makes continued compliance with the Railway Labor Act a condition of holding a certificate, the Board has construed the required section 412 finding as encompassing adherence to the Railway Labor Act wherever the Act is in issue. *See* Six-Carrier Mutual Aid Pact, 29 C.A.B. at 170 (App. 7a). Apart from the Railway Labor Act contentions, there is no issue in this case as to violation of the Federal Aviation Act.

tain approval the Board's conclusion, undisputed by the unions, that

> "the employees retain substantial and effective bargaining power regardless of the Mutual Aid Agreement. Thus, the record shows that air carrier wages . . . are higher than, and . . . have increased faster than, wages in other industries, including other transportation industries." (App. xiii).

The Court also sustained the Board's findings, in support of its conclusion, that the airlines, as a service industry unable to stockpile services and heavily dependent on passenger transport, are particularly vulnerable to strikes and thus have substantial need for financial protection from strike damage. It upheld the Board's finding that the agreement would not seriously reduce airline incentive to settle disputes, which finding had been based on the relative infrequency of strikes in recent years, the heavy cost of strikes even with Mutual Aid, and the other financial pressures on carriers to settle disputes with unions. The Court also agreed with the Board's view that the agreement did not adversely affect the financial viability of participating airlines, and that weaker carriers, which had the most to lose from a strike, were not disadvantaged by participating. (App. xiii-xvii).

The three certiorari petitions seek review of the Court of Appeals decision.

REASONS FOR DENYING THE WRIT

No reasons have been advanced that would warrant Supreme Court review of this straightforward regulatory agency review case. Neither the case nor the decision below raises any novel or unusual questions.

There is no issue of statutory interpretation, but rather only the application of well-understood principles to the particular facts. The decision below is fully consistent with decisions of this and other courts. Certiorari should be denied.

1. None of the petitions makes a showing, as contemplated by Rule 19, of considerations that would warrant the exercise of discretionary certiorari review. Only the Air Line Pilots Association, International (ALPA), even attempts such a showing, and it merely argues that the decision below was incorrect and that it affects virtually the entire airline industry. ALPA Pet., pp. 11-13. This does not suffice to meet the burden of a petitioner seeking review of a unanimous decision by a Court of Appeals especially experienced in overseeing the kind of regulatory action involved in this case.

The decision below is not claimed to be in conflict with any decision of this Court or any court of appeals.[9] The closest case in point, *Kennedy* v. *Long*

[9] ALPA asserts without amplification that "the Board holds that it has power to exempt the Pact from the antitrust laws, contrary to the rulings in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), and *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973)." ALPA Pet., p. 12. It is a fact that, pursuant to section 414 of the Federal Aviation Act (49 U.S.C. § 1384), the effect of the Board's approval of the Mutual Aid agreement is to confer antitrust immunity with respect to its implementation. The *Pan American* and *Hughes* cases did not involve CAB action which invoked section 414 and have nothing to do with this case. In any event, the court below declined to consider ALPA's antitrust contentions because they had not been presented to the agency. (App. xi). *And see* Federal Aviation Act § 1006(e), 49 U.S.C. § 1486(e). This ground alone is sufficient to dispose of the antitrust arguments contained in ALPA's certiorari petition (pp. 29-30). The other petitioners have not advanced antitrust arguments in either the court below or their petitions to this Court.

Island R.R., 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963), which upheld the railroad strike insurance arrangement against challenge based on the Railway Labor Act, Interstate Commerce Act and antitrust laws, is fully consistent with the decision below. Moreover, there is no substantial question of statutory interpretation raised in this case. There is little if any disagreement as to the meaning of the applicable provisions of the Railway Labor Act; the only dispute is whether the facts of this case make out a transgression of those provisions. The court below applied conventional standards of review, carefully analyzing the conclusions of the CAB and assuring itself that the Board's findings rested on a sufficient evidentiary basis. In sum, there is nothing to distinguish this case from scores of other appellate court reviews of regulatory agency actions, and nothing to warrant the Court in selecting this case for further review.

2. Pursuant to section 412 of the Federal Aviation Act (49 U.S.C. § 1382), the Board determined that the Mutual Aid agreement was not adverse to the public interest. Each of the union petitions contains arguments on the public interest issue which, for the most part, were considered and rejected by the Board and the Court of Appeals.

The Air Line Dispatchers' Association, *et al* (ALDA), repeat their major argument below—that the Board applied an incorrect standard in deciding the public interest question. According to ALDA, the Board approved the Mutual Aid agreement because it strengthened the bargaining power of airlines vis-a-vis unions. ALDA Pet., p. 11. This is incorrect. The Board's judgment of approval was based on its conclusions, set out in its 1970 approval order and re-

affirmed in its 1973 order, that the agreement was consistent with national labor policy and furthered the public interest by spreading the severe burden of strike losses, but was without significant adverse impact on collective bargaining, and in particular was not the cause of lengthened service interruptions. *See* App. 145a-150a, 154a-155a, 181a-197a, 228a-233a. The Board went on to deal with *union* contentions, to some extent mirrored in the Administrative Law Judge's 1972 Initial Decision, that the agreement should be disapproved because it improved the bargaining position of the airlines. The Board rejected this claim, concluding that this effect alone, even if true, would not warrant a finding that the agreement was adverse to the public interest. In this context the Board emphasized the great pressures on airlines, financial and other, to settle a strike dispute, even where Mutual Aid is available. (App. 232a-236a, 249a-251a). Far from constituting application of an improper standard, the Board's reasoning was fully consistent with controlling law and soundly grounded in the record. The Court of Appeals had no difficulty in sustaining this aspect of the Board's decision (App. xiii-xvi).

ALDA says the Board erred in allowing "financially weak" carriers to decide for themselves whether to join the agreement. ALDA Pet., pp. 14-16. The court below considered this contention at length and concluded that the Board's findings, contrary to those urged by ALDA, were "reasonable" and "adequately supported." (App. xvi-xvii). ALDA's petition alludes to the court's treatment of the issue but does not demonstrate that it was incorrect. ALDA Pet., p. 16. [10]

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[10] ALDA has suggested that action on the petitions in this case be deferred pending action on possible petitions in another CAB

(Footnote Cont'd)

ALPA's "Point I" in the Argument portion of its petition contains a potpourri of public interest arguments it has advanced in the proceeding before the Board and the court below. Many were dealt with and explicitly rejected by the Court of Appeals; all are answered in the brief of the Trunkline Carrier Parties in the court below (pp. 36-47), and no purpose would be served by repeating the answers here. ALPA's contentions were found wanting by the CAB in its 1970 and 1973 orders and were likewise rejected by the Court of Appeals. It has not shown that still another round of review would produce a different result.

3. Both ALPA and the Allied Pilots Association (APA) argue that the Mutual Aid agreement is multi-employer economic activity which is impermissible except in the context of a multi-employer bargaining unit and only then where necessary to protect the integrity of that unit. ALPA Pet., pp. 25-27; APA Pet., pp. 12-14.[11] The three cases cited for this prop-

review case, involving the formation of the Airlines Industrial Relations Conference which was approved by the Board subject to substantial modification of the Articles of Association. Since the filing of ALDA's petition, the Court of Appeals for the District of Columbia Circuit has entered an order affirming without opinion the CAB's approval of the Conference. The issues in that case are not the same as those raised in this case, and the unions at no time have sought consolidation of the two proceedings, either at the Board or court level. Thus, there is no reason for the Court to delay action on the certiorari petitions in this case.

[11] APA advances this argument as part of a broader point that the CAB may not approve Mutual Aid because the agreement did not exist in 1936 when the Railway Labor Act was extended to the airline industry. APA Pet., p. 11. The sole support for this extraordinary contention is an extensive review of the legislative history of the Railway Labor Act of 1926, not advanced before the Board or the Court of Appeals, which is apparently designed to show that that statute was a cooperative effort by railroad management and labor. While this may be so, it does not follow that

(Footnote Cont'd)

osition demonstrably do not support it. *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87 (1957), and *NLRB* v. *Brown*, 380 U.S. 278 (1965), though sustaining multiple employer lockouts in a multi-employer bargaining situation, neither stated nor intimated that the activity was limited to such situations. *NLRB* v. *Great Atlantic & Pacific Tea Co.*, 340 F.2d 690 (2d Cir. 1965), held only that employers could not, through joint lockout action, force a union to engage in multi-employer bargaining. As the court below ruled, the Mutual Aid agreement does not have this tendency, and the *A&P* decision does not undermine the Second Circuit Court's earlier holding in the *Kennedy* case sustaining multi-employer financial action in the context of individual employer bargaining.[12] (App. ix-x).

ALPA and APA also cite *Brotherhood of Railway Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238 (1966), as standing for the principle that a carrier's right of self-help under the Railway Labor Act is "strictly limited" and that "any carrier self-help which has the

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unions and employers must be confined in their collective bargaining techniques and strategies to those in existence when the statute was enacted, or when it was made applicable to the airline industry. The Act contains broad guidelines for the conduct of labor relations in the industries to which it applies; within those guidelines there is substantial room for self-help. The court below recognized this broad scope for self-help, and found on abundant evidence that the Mutual Aid agreement did not contravene the provisons or policies of the statute. (App. viii-x). APA does not advance any grounds that would warrant review of this determination.

[12] Judge (now Chief Judge) Kaufman was the author of both the *Kennedy* and the *A&P* case opinions. There is no suggestion in his opinion in the *A&P* case of any intention to recede from the strong position in favor of the legality of mutual employer financial assistance announced in the *Kennedy* case.

effect of prolonging interruption of regular service is inconsistent with the Railway Labor Act." ALPA Pet., p. 27; APA Pet., pp. 14-15. It is claimed that the effect of the Mutual Aid agreement is to prolong and broaden strikes and to give carriers an incentive to resist settlements. The Board found that the agreement did not have these effects and the Court of Appeals sustained this finding as amply supported by the record. (App. xiv-xvi). Beyond this, the unions' reading of the *Florida East Coast* case is incorrect. As the court below held, *Florida East Coast* permits a carrier, in certain circumstances, to alter the terms and conditions of the collective bargaining agreement with a striking union without following the usual statutory bargaining procedures. This is an exception to the normal requirement of exhaustion of the Act's procedures before self help may be invoked, and was warranted by the public interest in maintenance of service during a strike. (App. x, n. 12). This decision in no way limits the right of self-help after the exhaustion of the Act's bargaining procedures, as the unions have argued. [13]

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[13] APA also contends that the CAB should have disapproved the application of Mutual Aid in the context of a strike by a union, such as APA, with representation rights on only one airline. The Board considered and rejected this proposal (App. 204a, 205a, 145a) and its decision was clearly correct. The purpose of Mutual Aid is to provide some financial protection to offset the severe damage suffered by a struck carrier. That damage is equally severe whether or not the striking union also represents employees on other airlines. APA's argument rests on the erroneous premise that the CAB approved the agreement only because of a concern for the overwhelming strength of unions with multi-carrier representation. This was not the basis of the Board's decision, and APA has advanced no public interest argument as to why a carrier that suffers damage from a strike by a single-carrier union should not have the partially offsetting financial protection of Mutual Aid.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-549

ALLIED PILOTS ASSOCIATION, PETITIONER

v.

CIVIL AERONAUTICS BOARD, ET AL.

No. 74-709

AIR LINE DISPATCHERS' ASSOCIATION, ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, ET AL.

No. 74-710

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, PETITIONER

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. iv-xviii)[1] is reported at 502 F. 2d 453. The opinion

[1] Petitioner Allied Pilots Association filed with the Court an appendix attached to its petition, No. 74-549. Petitioners

and order of the Civil Aeronautics Board approving, upon reconsideration, renewal of the amended Mutual Aid Pact (Pet. App. 225a–270a), and the initial decision of the Administrative Law Judge (Pet. App. 271a–330a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1974. The petition for a writ of certiorari in No. 74–549 was filed on November 6, 1974; the petitions in Nos. 74–709 and 74–710 were filed, pursuant to an extension granted by the Chief Justice on December 6, 1974.

The jurisdiction of this Court is invoked under Section 1006(f) of the Federal Aviation Act (49 U.S.C. 1486(f)) and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Civil Aeronautics Board, in approving renewal of the air carriers' Mutual Aid Pact, as amended, properly determined that the agreement is not adverse to the public interest, pursuant to Section 412(b) of the Federal Aviation Act, 49 U.S.C. 1382 (b), and is consistent with national labor policy and the Railway Labor Act, 45 U.S.C. 151–188.

STATUTES INVOLVED

The relevant sections of the Federal Aviation Act, 72 Stat. 731, as amended, 49 U.S.C. 1301, *et seq.*, and

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Air Line Dispatchers' Association and Air Line Pilots Association, International, filed petitions with a separate appendix, Nos. 74–709 and 74–710. The documents and materials contained in both appendices essentially are identical and, for the Court's convenience, "Pet. App." references are confined to the appendix in Nos. 74–709 and 74–710.

the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 151, *et seq.*, are set forth in the Appendix to this brief (pp. 15–18).

STATEMENT

Pursuant to Sections 401(k)(4) and 412 of the Federal Aviation Act, 49 U.S.C. 1371(k)(4) and 1382, the Civil Aeronautics Board must assure that cooperative working arrangements among air carriers are consistent with the national labor policy and with the Railway Labor Act, 45 U.S.C. 151–188, are not adverse to the public interest, and are otherwise in accordance with the Federal Aviation Act.

1. In 1958 six certificated air carriers formed a Mutual Aid Pact. This agreement provided financial assistance to a party whose flight operations were shut down by a strike. The strike-bound carrier would receive from the carriers still operating a "windfall" payment equaling their "increased revenues attributable to the strike * * * less applicable added direct expenses" (Pat. App. 7a). The Board approved this agreement in 1959 in *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168 (Pet. App. 5a–34a), reconsideration denied, 30 C.A.B. 90 (Pet. App. 35a–40a).

In 1960 the carriers applied to the Board for approval of an amendment to the agreement providing that, whenever the windfall payments received by the struck carrier did not amount to 25 percent of its normal operating expenses, supplemental payments totaling that percentage would be made by the other carriers. Each operating carrier would contribute a supplemental payment in proportion to its air transport revenues for the previous calendar year, but in

no case would its supplemental payment exceed one-half of one percent of its air transport revenues for the previous year (Pet. App. 45a). In 1964, after a full hearing, the Board approved the Mutual Aid Pact, as amended, for three more years. *Mutual Aid Pact Investigation*, 40 C.A.B. 559 (Pet. App. 44a–129a).[2]

By 1967 seven carriers were parties to the Mutual Aid Pact. The Board thereupon instituted an investigation to determine whether it should grant continued approval to the Pact and whether it should attach new conditions to approval (Pet. App. 134a–137a). On March 7, 1969, the Administrative Law Judge determined that the Pact was lawful and should be approved without any new conditions (Pet. App. 162a–220a).

Prior to Board review of the Administrative Law Judge's determination, the parties amended the Pact to increase the level of supplemental payments to a struck carrier from 25 percent of its normal operating expenses to 50 percent during the strike's first two weeks, declining weekly thereafter by 5 percent, and leveling off at 35 percent in the fifth and following weeks of the strike. Each carrier's supplemental payment ceiling was increased from one-half of one percent to one percent of its air transport revenues for the previous year (Pet. App. 151a).

[2] During the interval between 1960 and 1964, the agreement remained in effect because, as noted by the Board, "agreements * * * subject to review by the Board under sec. 412 * * * may be made effective among the parties without first being approved by Board order" (Pet. App. 42a, n. 7).

On July 23, 1970, the Board approved the newly amended Pact (Pet. App. 142a–162a). It determined that the prior agreement had had little, if any, impact on labor-management relations (Pet. App. 146a–150a). It also found no evidence indicating that the agreement, as amended, would induce strikes, exacerbate labor-management relations, or create an imbalance in the collective-bargaining process that would threaten the public interest objectives of the Act (Pet. App. 154a). The Board recognized that the increase in supplemental payments would permit substantially greater recoupment of strike losses, particularly during short strikes when maximum benefits were provided, but concluded that carriers would still be induced to avoid strikes (Pet. App. 155a).

Upon petition for reconsideration, the Board vacated its approval and remanded the case for the purpose of gathering a more "fully developed record" on events that had occurred after the close of the earlier hearing (Pet. App. 221a–224a), including the new amendments and two subsequent labor disputes (Pet. App. 230a). Following the Board's order of remand, the carriers adopted an additional amendment, effective January 1, 1971, to permit participation in the Pact by local service carriers (Pet. App. 230a).[3]

2. On March 27, 1972, the Administrative Law Judge determined that the new provisions for increased supplemental payments, increased contributions to fund the supplemental payments, and partici-

[3] Participation in the agreement had been limited to trunk (long haul) carriers.

pation by local service carriers should be disapproved because they created the "real possibility" that a party to the agreement might prolong a strike for short-term benefits to the detriment of the traveling and shipping public, and "heighten[ed] the danger" that airlines contributing to the struck carrier might be weakened financially (Pet. App. 284a). The Administrative Law Judge found the remainder of the agreement to be in substantially the same form as approved by the Board in its 1970 decision, and held that such a cooperative arrangement would not be adverse to the public interest and would not violate national labor policy or the Railway Labor Act (Pet. App. 310a–311a).

On review of the Administrative Law Judge's decision, however, the Board approved the amended agreement in full (Pet. App. 225a–270a). The Board found no evidence that the three new amendments to the Pact so changed the basic nature of the agreement as to make it, unlike its predecessor, adverse to the public interest. Subject to a condition concerning local service carriers,[4] the Board approved the Pact for a renewal period of five years (Pet. App. 232a).

3. On petitions for review, the court of appeals unanimously affirmed the Board's order (Pet. App. iv-xviii). Observing that national labor policy "rests on the principle that parties should be free to marshall the economic resources at their disposal in the resolution of a labor dispute, consistent with the spe-

[4] The condition insured that local service carriers would not receive any increased subsidy for their payments to the Pact.

cific rights and prohibitions established by the labor statutes" (Pet. App. viii), the court held that the Board's approval of the Pact was consistent with national labor policy and the Railway Labor Act (Pet. App. ix–x).[5] The court also found adequate support in the record for the Board's findings that employee welfare was not jeopardized by the Pact (Pet. App. xiii); that the industry was not made more vulnerable to strikes (Pet. App. xiii–xiv); that the Pact did not tend to promote or prolong strikes (Pet. App. xiv–xvi); and that the Pact did not harm economically marginal air carriers (Pet. App. xvi–xvii).

ARGUMENT

1. Petitioners Air Line Pilots Association (ALPA) and Allied Pilots Association (APA) contend that the Mutual Aid Pact unlawfully interferes with the economic relations of air line carriers and their unions in violation of the Railway Labor Act, 45 U.S.C. 151a.[6] The Act, while permitting both sides in a railway labor dispute to resort to economic "self-help" in an attempt to force a settlement most favorable to it, also imposes a duty on employers and employees to bargain in good faith, 45 U.S.C. 152; it recognizes the right of employees to organize without employer interference, *ibid.*; and it establishes certain procedures

[5] The court cited *Kennedy* v. *Long Island R. R. Co.*, 211 F. Supp. 478 (S.D.N.Y.), affirmed, 319 F. 2d 366 (C.A. 2), certiorari denied, 375 U.S. 830, in support of its decision (Pet. App. ix–x).

[6] The Railway Labor Act is made applicable to air carriers by 45 U.S.C. 181 and by Section 401(k)(4) of the Federal Aviation Act, 49 U.S.C. 1371(k)(4).

that first must be followed in order to attempt to resolve disputes through the direct bargaining process, 45 U.S.C. 154–163, 183–185.

As the court of appeals found, the Board's approval of the Pact, as amended, is fully consistent with the labor policy of the Railway Labor Act (Pet. App. x). Contrary to petitioner APA's assertion, the Pact has no tendency to establish industry-wide bargaining or force employees into multi-employer bargaining units: "The terms of the agreement are unrelated to the nature of the bargaining unit, and despite effectiveness of the Agreement since 1958, there has been no transition to industry-wide bargaining" (Pet. App. 240a, n. 14).[7] Moreover, as the court of appeals noted (quoting the Board's findings), " 'the record is replete with evidence of the earnest and consistent good faith efforts of [the Mutual Aid Pact Members] to find a resolution to their strikes throughout the course of difficult labor negotiations' " (Pet. App. ix; 240a–241a). Finally, the Railway Labor Act does not define economic "self-help" so strictly as to exclude various forms of strike insurance, such as the Mutual Aid Pact. Both the Board and court of appeals recognized that "[i]t is not generally given to government agencies to 'regulate what economic weapons a party might summon to its aid' " (Pet App. viii). *National Labor*

[7] Petitioner APA relies upon *National Labor Relations Board* v. *Great Atlantic & Pacific Tea Co.*, 340 F. 2d 690 (C.A. 2), which held that a lockout by employers not in the same bargaining unit as the company being struck violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). But, as the court of appeals noted, the Pact does not have any coercive tendency (Pet. App. x).

Relations Board v. *Insurance Agents' Int'l. Union*, 361 U.S. 447, 490; see *Kennedy* v. *Long Island R.R. Co.*, 211 F. Supp. 478 (S.D.N.Y.), affirmed, 319 F. 2d 366 (C.A. 2), certiorari denied, 375 U.S. 830.[8]

2. Petitioners Air Line Dispatchers' Association (ALDA) and APA contend that the Board improperly considered the Pact's effect upon the balance of bargaining power between air line carriers and their employees as a criterion for determining its acceptability. But this misconstrues the Board's determination.

In appraising agreements among air carriers pursuant to Section 412 of the Federal Aviation Act, 49 U.S.C. 1382, the Board is required to disapprove any agreements found to be "adverse to the public interest." Thus, the Board assessed the Pact's potential impact upon the relative bargaining strength of union and management only to assure that the public in-

[8] In *Kennedy*, the union alleged that the company's strike insurance plan (whose similarity to the air lines' Mutual Aid Pact was expressly noted by the court) violated the Railway Labor Act. The court upheld the plan, reasoning that the Act permits employers to use the economic resources at their disposal, including multi-employer action. The court found further support in Section 20 of the Clayton Act, 29 U.S.C. 52, and Section 4 of the Norris-LaGuardia Act, 29 U.S.C. 104, which permit the payment of benefits to parties engaged in a labor dispute. See also *Brotherhood of Railway and Steamship Clerks* v. *Florida East Coast Railway Co.*, 384 U.S. 238.

Petitioner ALPA's effort to distinguish *Kennedy* on the ground that multi-employer bargaining is common in the railroad industry ignores the fact that in *Kennedy*, as here, the carrier bargained strictly for itself and was free to take whatever bargaining position it wished. *Kennedy*, *supra*, 211 F. Supp. at 488.

terest would not be jeopardized by any change in bargaining power brought about by the Pact.

Petitioner ALDA asserts that the Board concluded that the Pact was not "adverse to the public interest" because the Pact strengthened the bargaining power of air carriers relative to their employees (Pet. 11). But the Board's conclusion in this regard was based in part upon its findings that, despite this, any such change in bargaining power would not prolong labor disputes, threaten marginal companies, or jeopardize employee welfare. Indeed, petitioners do not dispute the Board's determination that (Pet. App. 234a–235a):

> [T]he employees retain substantial and effective bargaining power regardless of the Mutual Aid Agreement. Thus, the record shows that air carrier wages * * * are higher than, and * * * have increased faster than, wages in other industries, including other transportation industries.

Petitioner ALPA also contends that the Board's analysis should not have been applied to its unique situation as an independent union representing the employees of a single carrier since it has relatively less bargaining power (Pet. 25–28). As we have indicated, however, the Board did not approve the Pact *because* it increased the bargaining power of management; it approved the Pact *despite* its potential effect upon bargaining power. APA's petition contains no basis for distinguishing its bargaining status from that of other air line unions which, although in most cases affiliated with an international organization, also bargain on a single-carrier basis.

3. Petitioners ALDA and ALPA dispute the Board's findings that the Pact, as amended, is not likely to have a serious impact on the willingness of companies to sustain or prolong strikes, and that payments required by the Pact are not likely to affect the viability of small or economically marginal air lines. As the court of appeals found, however, these determinations were supported by substantial evidence on the record (Pet. App. xiv–xvii).[9]

a. Both the Board and the Administrative Law Judge agreed that the record does not establish that any carrier has incurred or prolonged a strike because of the increased level of mutual aid (Pet. App. 232a–233a; 301a). Although the Administrative Law Judge found that the Pact had a *potential* for prolonging and increasing the number of work stoppages, the Board determined that this risk was not substantial in light of the relative infrequency of negotiations in the air lines industry erupting into strikes in years when the new amendments were actually in effect (Pet. App. xv), and the significant financial pressures to settle that remain on the air lines despite their participation in the Pact (Pet. App. 236a).

In assessing the companies' financial position during strikes, the Board found that the Administrative Law Judge had not taken into account post-strike

[9] Federal courts may overturn the Board's findings of fact only if unsupported by substantial evidence on the record. (49 U.S.C. 1486(e)).

losses (the cost of resuming operations, loss of advance bookings, loss of carrier identity in the market), and the loss of normal profits (which the company would have enjoyed had the strike not continued), both of which outweighed any short term benefits attributable to the aid payments (Pet. App. at 238a–239a). As the court of appeals held, the Board's considered judgment on these necessarily speculative costs was based on the "best information available" (Pet. App. xv–xvi).[10]

b. The Board's determination that the Pact does not significantly threaten the financial stability of its members was based in part on the Administrative Law Judge's finding that the record did not "demonstrate that the viability of any carrier has been critically threatened because of the higher level of contributions required under the amended agreement" (Pet. App. 301a). The Board also compared the amounts paid by various air lines under the Pact with the strike losses incurred by members when the new higher payment ceilings were in effect (Pet. App. 243a–244a), and con-

[10] Petitioner ALPA contends that the Board's reliance on carrier estimates of post-strike losses are unreliable. As the court of appeals stated in rejecting this argument, however, ALPA fails to "point to evidence that the * * * [carriers] reached their estimates by misguided or meritricious methods" (Pet. App. xvi). Moreover, as the court of appeals also noted, the Board sought to control the risk of error by limiting its approval of the agreement to a period of five years, thereby insuring that if the estimates prove wrong, they may be corrected (Pet. App. xvi).

cluded that payments were not out of proportion to the gains from the protection offered by the Pact. As the court of appeals held (Pet. App. xvi–xvii), this conclusion was not "unreasonable," since financially weak carriers stand to lose most from strikes or threats of strikes (Pet. App. 245a).

Moreover, the Pact's one-percent ceiling on contributions limits the financial obligation of any air line in the pact in proportion to its operating revenues. Although additional "windfall" payments may increase a carrier's total obligation above the one percent level, the "windfall" payments pose no real burden since they represent profits which the company enjoys solely because of its competitor's strike. The Board so found and the court of appeals agreed (Pet. App. xvii).[11]

4. Finally, petitioner ALPA contends that the Pact violates Section 1 of the Sherman Act, as amended, 15 U.S.C. 1, and may not, therefore, be approved by the Board (Pet. 29–30). ALPA failed to raise this issue before the Board, however, and the court of appeals, relying on Section 1006(e) of the Federal Aviation Act (49 U.S.C. 1486(e)), properly declined to consider

[11] Petitioners' assertion that Pan American World Airways paid large sums to the Pact in recent years but received no benefits because it endured no strikes during this period is irrelevant. As the Board found, every participating carrier (including Pan American) enjoys the benefit of strike insurance (Pet. App. 243a).

the matter. See *United States* v. *Tucker Truck Lines*, 344 U.S. 33.[12]

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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[12] Approval under Section 412 of the Act (49 U.S.C. 1382) grants antitrust immunity under Section 414 of the Act (49 U.S.C. 1384). *Pan American World Airways* v. *United States*, 371 U.S. 296, 305. The Board may approve an anticompetitive agreement as being not adverse to the public interest under Section 412 of the Act.

Since petitioner did not present its contention of antitrust violation to the Board, and the court of appeals declined to consider the matter, it is not necessary here to discuss the standards which the Board must follow in approving a severely anticompetitive agreement as being in the public interest under Section 412 of the Act.

APPENDIX

Federal Aviation Act

Sec. 412. [72 Stat. 770, 49 U.S.C. 1382] (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transporta-

tion and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

* * * * *

Sec. 414. [72 Stat. 770, 49 U.S.C. 1384] Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

* * * * *

Sec. 1006. [72 Stat. 795, as amended by 74 Stat. 255, 75 Stat 497, 49 US.C 1486]

* * * * *

(e) The findings of facts by the Board or [Secretary of Transportation], if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or [Secretary of Transportation] shall be considered by the court unless such objection shall have been urged before the Board or [Secretary of Transportation] or, if it was not so urged, unless there were reasonable grounds for failure to do so.

* * * * *

Railway Labor Act

TITLE I

Sec. 2. [44 Stat. 577, as amended by 48 Stat. 1186, 62 Stat. 909, 64 Stat. 1238, 45 U.S.C. 151a, 152] The

purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

General Duties

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

* * * * *

TITLE II

Sec. 201. [Added by 49 Stat. 1189, 45 U.S.C. 181] All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the

United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

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